Before the

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Applications of Comcast Corporation,	)	MB Docket No. 10-56
General Electric Company	)	
And NBC Universal, Inc.	)	
	)	
For Consent to Assign Licenses and	)	
Transfer Control of Licenses	)	

Opposition of Comcast Corporation to Petition of the National Association of African American Owned Media and Entertainment Studios, Inc.

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April 4, 2016

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Opposition of Comcast Corporation to Petition of the National Association of African American Owned Media and Entertainment Studios, Inc.

Pursuant to 47 C.F.R. § 1.45(b), Comcast Corporation ("Comcast") opposes the "Petition for Immediate Investigation and Imposition of Conditions, Monetary Forfeitures, Revocation and/or Non-Renewal of Licenses" filed on March 24, 2016 by the National Association of African-American Owned Media ("NAAAOM") and Entertainment Studios, Inc. ("ESI").

The Petition is just the latest aspect of a strategy by ESI's owner Byron Allen to use litigation (and now the administrative process) as a means of obtaining his own desired business outcome—the carriage of ESI's suite of networks—that the market has not supported. This is not the first time (or second, or third) that Petitioners have accused a programming distributor of instituting racist practices. Petitioners are serial litigants who have proven themselves willing to sue anyone in the industry that declines to offer ESI millions of dollars a year in carriage fees for programming that does not appear to enjoy market acceptance. Indeed, over the past two years, NAAAOM and ESI have sued not only Comcast, but also Time Warner Cable, AT&T, DirecTV, and Charter Communications (as well as the NAACP, the National Urban League, the National Action Network, Al Sharpton, former FCC Commissioner Meredith Baker, and the Commission

itself), claiming in each case that ESI was the victim of intentional racial discrimination against African Americans.

Faced with overwhelming and undeniable evidence that Comcast is a firm supporter not only of networks that are owned by African Americans, but also of African American focused programming, Petitioners have resorted to baseless allegations against Comcast's African American business partners, whom they offensively label as "token[s]" and "window dressing" (Pet. at 17), because they fail Petitioners' made-to-order "100% African American-owned" litmus test (*id.* at 19–20). Comcast is proud of its relationships with these business partners, and of the commitments to fostering diversity that it has made voluntarily to its shareholders and customers, to respected civil-rights organizations (including the NAACP and the National Urban League), and to this Commission. And as Comcast has reported to the Commission since completing its acquisition of NBCUniversal, Comcast continues to fulfill—and *exceed*—those voluntary commitments.

When Comcast sought to acquire NBCUniversal in 2011, the Commission conditioned its approval of the acquisition on Comcast's commitment to add "ten new independently owned-and-operated channels to its digital (D1) tier" that are not "Affiliate[s] of Comcast or a top 15 programming network, as measured by annual revenues." *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4358–59 (2011) ("*Comcast-NBCUniversal Order*"). Comcast separately made a voluntary commitment to several civil rights organizations—which was not made a condition of the Commission's approval of the NBCUniversal transaction—that four of the independent networks would be "new networks . . . in which African Americans have a majority or substantial ownership interest," and that two such networks would be added within the first two years of Comcast's acquisition of NBCUniversal (with the remaining two networks to be added within eight years). *Id.* at 4500.

Contrary to Petitioners' unsubstantiated allegations, Comcast has not only satisfied the Commission's condition on new independent networks, but it has also met the first step of its voluntary commitment on diverse programming. Specifically, Comcast reached agreements in February 2012 to add to its cable systems Aspire and Revolt—two new, independently owned-and-operated programming networks in which African Americans have a majority ownership interest. When Comcast agreed to carry Aspire and Revolt, it ensured that each network had not just substantial African American ownership, but *majority* African American ownership. Gaiski Decl. ¶ 2.

Petitioners offer zero factual support for their baseless speculation that Aspire and Revolt are not independent under the terms of the merger condition and are not majority or substantially owned by African Americans under Comcast's voluntary commitment to the civil rights organizations. Yet, based on these unsupported charges, they demand from the Commission a "comprehensive, detailed investigation" of Comcast's programming-related diversity initiatives and the racial makeup of its minority business partners. Pet. at 22. Not only would such an action be wholly unwarranted, but it also may well be beyond the scope of the Commission's enforcement authority in this context. As the Commission has already recognized, its "ability to dictate the programming policies of [its] licenses" is limited by "the First Amendment, Section 326 of the Act, and Commission precedent." *Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4317–18. The Commission has thus declined to "impose quotas on the amount of minority-produced or directed programming" that Comcast must offer, and concluded that "the ultimate determination of which proposals should be selected for further development is a creative one that should be dictated by Comcast-NBCU's individual evaluation of each proposal under consideration." *Id.* at 4317–18. Petitioners' false accusations and inflammatory rhetoric are no reason for the Commission to reassess this sound decision.

Petitioners have brought their baseless allegations to the Commission because a federal district court judge has already once held that their allegations of supposed intentional race

discrimination are insufficient to even "allege any plausible claim for relief." Huston Decl., Ex. A at 3. For the reasons just stated, the courts are the only proper venue for litigating Petitioners' claims of intentional race discrimination—not this Commission. And the courts are in fact the venue where Petitioners are *currently* pursuing this exact claim against Comcast (and other programmers). Petitioners have no basis to ask the Commission to step in, notwithstanding their contention that the Commission has been "toothless," Pet. at 21 n.21, or even "complicit" in racism, Pet. at 20. The Commission should leave Petitioners to pursue the last chapter of their claim in court. To the extent that Petitioners' ridiculous allegations are relevant at all to the actual NBCUniversal conditions, the Commission should dismiss the petition.

I. Background

Comcast has a long and distinguished record on diversity, and is fully committed to expanding opportunities for minorities in all aspects of its business.

Comcast is a proud supporter of African American programming. Comcast carries 15 networks geared towards the African American community, such as the Africa Channel, BET, Centric, UP TV, and TV One, and since 2011 it has launched or expanded the distribution of seven independent African American networks by over 36.5 million subscribers. Comcast has expanded the quality and quantity of diverse programming available through its VOD and online platforms to nearly 12,000 combined hours by year-end 2015, an increase of 70 percent over 2014, and more than 1,100 percent over year-end 2010. Just last year, African American programming hours on VOD increased by 13 percent compared to 2014, while online African American hours increased 47 percent. Every February, Comcast celebrates Black History Month with a special collection of programming across Xfinity TV platforms, including a curated collection of films from the American Black Film Festival. Comcast has also expanded "His Dream Our Stories"—a multiplatform, award winning, interactive experience launched in 2013 to commemorate the 50th anniversary of the March on Washington for Jobs and Freedom—with

new interviews and an extended collection of videos featuring key moments in civil rights history.

Consistent with its long-standing commitment to diversity, Comcast worked with several respected civil rights and advocacy organizations for African Americans, Hispanic Americans, and Asian Americans to address diversity concerns in connection with its proposed acquisition of NBCUniversal. Based on its dialogue with those organizations, Comcast voluntarily entered into three memoranda of understanding in order to expand on its commitment to diversity and inclusion and promote opportunities for minorities seeking to do business with Comcast. *See Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4450–4505.

In a memorandum of understanding ("MOU") with three distinguished African American civil rights groups (the NAACP, the National Urban League, and the National Action Network), Comcast pledged to focus on five areas of action: corporate governance, employment (especially workforce recruitment and retention), procurement, programming, and philanthropy and community investments. *Id.* at 4492–4505. Comcast also committed to add at least ten "new independently owned-and-operated channels" over the following eight years (a commitment that was also memorialized as a condition in the Commission's *Comcast-NBCUniversal Order*, *see id.* at 4358), with at least eight networks where "minorities have substantial participation, either through ownership or operational control." *Id.* at 4500. Comcast further stated that, in at least four of the networks, "African Americans [will] have a majority or substantial ownership interest," and at least two of those networks would be added in the first two years after the merger. *Id.* The Commission approved Comcast's acquisition of NBCUniversal.[1] In its order

[1] Contrary to Petitioners' fantastical allegations (here and elsewhere) that some Commissioners acted in bad faith, there is no evidence at all that then-Commissioner Meredith Baker used "unreported connections" and "[c]losed-door" meetings to sell her vote on the merger in exchange for a future position with Comcast. *Contra* Pet. at 3–4 n.2. There is similarly no basis whatsoever for the fabricated assertion that Commissioner Clyburn traded her vote to Rev. Al

approving the acquisition, the Commission noted that Comcast had met with "a broad range of stakeholders in this proceeding," and included copies of the MOUs in its order. *Id.* at 4317.

Since the acquisition of NBCUniversal, Comcast has not only met the Commission's independent-networks condition, but also met and exceeded its voluntary diversity commitments, as Comcast has reported annually to the Commission. The first two African American owned networks added were Aspire in June 2012 and Revolt in October 2013.[2] There is no question whatsoever that both networks readily met and meet the Commission's independence condition and the voluntary commitments Comcast outlined in the MOU: Comcast does not have any equity interest in either Aspire or Revolt; neither network was previously carried by Comcast; neither Aspire nor Revolt is an Affiliate of Comcast; and when Comcast entered the programming carriage contracts with Aspire and Revolt, neither was an Affiliate of any one of the top 15 programming networks, as measured by annual revenue. At that same time, Comcast obtained representations from each network that they are majority owned by African Americans. Gaiski Decl. ¶¶ 2−5.

These networks were selected because, in Comcast's judgment, they offered the best content-management experience, ability to secure financing, and overall value proposition for its customers, including in particular the African American community. Aspire's programming includes original series such as Exhale, ABFF Independent, and Black College Quiz, as well as sporting events at historically black colleges and universities. *See* http://www.aspire.tv/shows. Revolt's programming consists of breaking music news, videos, artist interviews, exclusive performances, and other original music-related programming. *See* https://revolt.tv/channel. As

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Sharpton in exchange for his political support of her father, Congressman James Clyburn. *Contra id.*

[2] Petitioners' claims that Comcast failed to meet the independent-networks condition are thus late by several years. *See* 47 U.S.C. § 503(b)(6)(B) (the Commission must bring non-broadcast enforcement actions within one year).

Petitioners acknowledge, NBA Hall of Famer Earvin "Magic" Johnson and artist and producer Sean "Diddy" Combs, both African Americans, are affiliated with Aspire and Revolt, respectively. Pet. at 7−8, 15.

Although Petitioners claim (with dubious relevance) that Comcast has "refus[ed] even to speak with ESI representatives" (Pet. at 19), Comcast has never refused to meet with ESI or Mr. Allen. Gaiski Decl. ¶ 6. In fact, Comcast has repeatedly met with ESI and Mr. Allen, and has reviewed all of the carriage proposals that he has submitted to date, but exercised its business judgment to determine that ESI's channels lacked sufficient consumer interest to warrant the costs in both dollars and bandwidth that carriage of those channels would entail. *Id.* ¶¶ 6–7. This was a decision that was made on the merits of the carriage proposals and is mirrored by the judgment of many other providers.[3]

After Comcast declined to license ESI's networks, ESI and NAAAOM (which was apparently created by ESI to file lawsuits) filed a complaint in the Central District of California in February 2015 against Comcast, Time Warner Cable, the NAACP, the National Urban League, the National Action Network, Al Sharpton, and former FCC Commissioner Meredith Baker, demanding a preposterous *$20 billion* in damages on the baseless allegation that Comcast and Time Warner intentionally discriminated against ESI on the basis of race in violation of 42 U.S.C. § 1981, and that all of the defendants engaged in a conspiracy to discriminate on the basis of race in violation of 42 U.S.C. § 1985(3). Huston Decl., Ex. B. Even though Petitioners admitted in their complaint that Comcast carries the 100% African American owned Africa Channel (*id.* ¶ 7), they nonetheless asserted that "100% African American–owned media has been shut out by Comcast" (*id.* ¶ 27). Similar to their claims in the Petition, Petitioners alleged

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[3] ESI did not make a formal proposal to Comcast during the 2011-2012 solicitation process that ultimately resulted in the selection of Aspire and Revolt, but Comcast considered ESI as part of that process anyway. Gaiski Decl. ¶ 8.

that "[w]hite-owned media in general—and Comcast in particular—has worked hand-in-hand with governmental regulators to perpetuate the exclusion of 100% African American–owned media from contracting for channel carriage and advertising" and that "[t]his has been done through, among other things, the use of 'token fronts' and 'window dressing'—African American celebrities posing as 'fronts' or 'owners' of so-called 'Black cable channels' that are actually majority owned and controlled by white-owned businesses." *Id.* ¶ 21.

Petitioners further alleged that "Defendants NAACP, National Urban League, Al Sharpton and National Action Network entered into the MOUs in order to facilitate Comcast's racist practices and policies in contracting—or, more accurately, refusing to contract—with 100% African American–owned media companies," that the "MOUs are a sham, undertaken to whitewash Comcast's discriminatory business practices," and that "Comcast uses the MOUs to perpetuate discrimination against 100% African American–owned media in contracting for channel carriage and advertising." *Id.* ¶ 6. Petitioners alleged that all of these respected African American civil rights organizations had "accepted large donations/pay-offs for their signatures" on the MOU, and had "conspired with Comcast to violate Entertainment Studios' civil rights by entering into sham 'diversity' agreements." *Id.* ¶¶ 18, 65. According to Petitioners, this supposed conspiracy relating to the MOUs extended to former Commissioner Baker, who allegedly "used her power at the FCC to Comcast's benefit." *Id.* ¶ 63. Petitioners made this serious charge of impropriety—which they labeled a "blatant and horrific conflict of interest and betrayal of the public trust" (*id.*)—based on nothing more than Comcast's subsequent employment of former Commissioner Baker.

The district court dismissed Petitioners' complaint after concluding that "the plaintiffs have failed to allege any plausible claim for relief." Huston Decl., Ex. A at 3. Per the standard practice under Federal Rule of Civil Procedure 15, the district court granted Petitioners leave to amend their complaint. Petitioners filed an amended complaint against Comcast that largely recycles the same allegations as the original complaint. Huston Decl., Ex. C. Comcast has

moved to dismiss that amended complaint because it is just as implausible as the original complaint (Huston Decl., Ex. D), and that motion is currently pending before the district court.

Petitioners have also filed similar racial discrimination suits against AT&T and DirecTV, and most recently Charter Communications. *See NAAAOM v. AT&T Inc.*, C.D. Cal., No. 2:14-cv-09256; *NAAAOM v. Charter Commc'ns, Inc.*, C.D. Cal., No. 2:16-cv-00609.[4] In the *Charter* case, Petitioners have named the Commission as a defendant. Huston Decl., Ex. E. According to Petitioners, "the FCC has done nothing to protect the voices of African American−owned media companies in the face of increased media consolidation," and that "[i]nstead, the FCC works hand-in-hand with these merging television distribution companies to enable and facilitate their Civil Rights violations." *Id.* ¶¶ 6–7. Petitioners allege that "[t]he FCC's conduct actually facilitates the economic exclusion [of] African American–owned media companies and supports white ownership using African American 'fronts.'" *Id.* ¶ 9; *see also id.* ¶ 10 ("The FCC enables and facilitates Charter's racial discrimination in contracting, in violation of 42 U.S.C. § 1981."). Petitioners also claim that "the FCC is engaging in extra-legal activity exceeding its statutory duties" and that "[i]t would therefore be futile" for them "to approach the FCC and seek relief therein." *Id.* ¶ 24. Petitioners "seek an order compelling the FCC to discontinue its facilitation of Charter's racial discrimination in contracting for channel carriage and end the practice of allowing sham MOUs to satisfy diversity requirements." *Id.* ¶ 31. They also seek more than $10 billion in damages from Charter. *Id.* at p. 25 (Prayer for Relief).

II. Petitioners' Allegations Are False and Unsupported

Petitioners allege—based mostly on sources "found on the Internet" (Pet. 9)—that Aspire and Revolt do not constitute independent programming networks that are majority or substantially owned by African Americans. From there, Petitioners speculate that Comcast

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[4] AT&T and DirecTV reached an out-of-court settlement with Petitioners. Defendants in the *Charter* case have not yet responded to Petitioners' complaint.

engaged in intentional race discrimination by selecting these networks, rather than ESI, for carriage. Leaving aside the latter claim—which has no connection at all to the request that the Commission investigate Comcast's compliance with the conditions of the *Comcast-NBCUniversal Order* and which is not properly before the Commission—the bottom line is that neither contention is remotely true. Both Aspire and Revolt clearly met the Commission's independent-networks condition. And although Comcast's voluntary diversity commitments to private parties are not a proper basis for the relief that Petitioners seek, Comcast also amply met those commitments as well. Petitioners' claim that Comcast discriminated on the basis of race because ESI's networks have not been chosen for carriage is unadulterated bunk—and was properly rejected by the court with jurisdiction to entertain it. The petition should be swiftly dismissed.

A. Comcast Has Fulfilled Its Diversity Commitments

Petitioners' main contentions are that the Aspire and Revolt networks are not really independent, and not really owned in substantial part by African Americans. As Petitioners themselves admit, they have no idea whether their contentions are true: They say there is "no way of knowing who owns what in [Aspire]" (Pet. at 7), and that "Revolt's ownership structure is not publicly available" (*id.* at 15). Petitioners begrudgingly acknowledge that Earvin "Magic" Johnson has an "ownership interest" in Aspire (*id.* at 7), and that Sean "Diddy" Combs provided some of Revolt's "starting finance" (*id.* at 15). But Petitioners nevertheless insist that the Commission investigate—and potentially impose "penalties" on Comcast (*id.* at 23)—because they speculate that the African American ownership of these networks is insufficient.

Petitioners' wild accusations obviously lack factual support, as is apparent by the fact that the Petition substitutes bluster for evidence. The Commission would be right to reject summarily Petitioners' irresponsible, unsubstantiated, and defamatory attack on Comcast without any inquiry at all into the veracity of the Petition's allegations. But because Comcast is proud that it has fulfilled its commitments, Comcast is providing with this opposition a declaration

establishing that: (a) Comcast does not have any equity interest in either Aspire or Revolt; (b) neither Aspire nor Revolt was previously carried by Comcast; (c) neither Aspire nor Revolt is an Affiliate of Comcast; (d) prior to entering these program carriage contracts, neither Aspire nor Revolt was an Affiliate of one of the top 15 programming networks, as measured by annual revenue; and (e) when Comcast launched Aspire and Revolt, it obtained representations that they are majority owned by African Americans. Gaiski Decl. ¶¶ 2–5. Revolt confirmed these facts about its ownership in a filing with the Commission on April 1, 2016, and Mr. Johnson did likewise in a statement reported the same day. *See Entertainment Studios, NAAAOM Assertions 'Inflammatory,' Magic Johnson Says*, Communications Daily (Apr. 1, 2016). That should be the end of the matter.

In any event, the minimal number of purported "facts" addressed in the Petition provide no grounds for the Commission to expend its time and resources on a "comprehensive" and "detailed investigation." Pet. at 22. The fact that these nascent channels partnered with private equity firms for a share of their financing is a testament to the promised future success of their businesses, rather than evidence of a violation of the Commission's condition in the *Comcast-NBCUniversal Order* or of Comcast's separate commitments in the MOU. Indeed, even after scouring the Internet and public records, Petitioners at most can allege that these partners account for a *minority* share of the channels' ownership—which is irrelevant to the independence condition and in no way contrary to diversity commitments voluntarily made in the MOU. *E.g.*, Pet. at 8 (alleging that InterMedia Partners, LP "owns 33% of Aspire"). That the networks have attracted investors who are not owned by African Americans does not change the fact that the networks are majority or substantially owned by African Americans.

Nor is there merit to Petitioners' novel theory that, because Aspire and Revolt have been operating "in partnership" with other entities, they cannot be considered "independent." Pet. at 7–8. Petitioners disingenuously ignore the definition of "independent" in the applicable condition of the *Comcast-NBCUniversal Order*. For good reason; the condition explicitly states

that, "[f]or purposes of" the "ten new independently owned-and-operated channels" that Comcast is required to add, "independent entities deemed to be eligible for such channels are those networks that are not carried by Comcast and not an Affiliate of Comcast or a top 15 programming network, as measured by annual revenues." *Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4358–59.[5] Aspire and Revolt plainly satisfied the condition's criteria to be "independent." Again, as stated above, they were not carried by Comcast prior to being selected. At no time have they been Affiliates of Comcast. And at the time they were selected, neither was a top 15 programming network or an Affiliate of a top 15 programming network.[6]

In short, nothing in the Petition remotely casts doubt on Comcast's disclosures to the Commission regarding its satisfaction of the independent-networks condition *or* its progress on the diversity initiatives in the voluntary MOU.

B. Comcast Does Not Discriminate In Channel Carriage

The Petition also accuses Comcast of discriminating against 100% African American owned content providers, beginning with the Black Family Channel in the early 2000s and continuing with Comcast's decision not to carry ESI's networks. The Commission is obviously an improper forum for Petitioners' claims of discrimination. First, because Petitioners are already litigating that precise claim before a federal district court. And second, because such claims have nothing at all to do with the conditions of the *Comcast-NBCUniversal Order*.

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[5] "Affiliate" means "any person directly or indirectly controlling, controlled by, or under common control with, such person at the time at which the determination of affiliation is being made." *Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4355.

[6] Petitioners note that an indirect subsidiary of JP Morgan Chase "holds an investment in Revolt," and that Stephen Burke, a "senior executive of Comcast," sits on the board of directors at JP Morgan. Pet. at 16. That obviously does not make Revolt an "Affiliate of Comcast." *Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4359. Petitioners go on to allege that Comcast has an ownership interest in Revolt. Pet. at 16. That is simply not true—Comcast does not have any equity interest in either Aspire or Revolt (Gaiski Decl. ¶ 4)—notwithstanding the stray comment in an Internet-only source on which Petitioners rely.

Petitioners' allegations of discrimination also happen to be false, and have been deemed implausible by a federal court.

Petitioners provide no evidence to substantiate the claim that Comcast discriminated against the Black Family Channel, either because of the race of its owners or because Comcast favored its own competing content. Pet. at 12–15. Petitioners accuse Comcast of making demands of the Black Family Channel—"give up an ownership interest in your company or else face diminished carriage" (*id.* at 12)—that are illegal, *see* 47 U.S.C. § 536(a)(1); 47 C.F.R. § 76.1301(a). Yet notably, the Black Family Channel itself never filed a complaint against Comcast with the Commission when these demands were supposedly made. In any event, Petitioners' claims regarding the Black Family Channel are false. Gaiski Decl. ¶ 9. And more fundamentally, there is nothing linking Petitioners' claims about the Black Family Channel to their assertions that Comcast discriminated against *ESI*, more than ten years later, in a wholly different context.[7]

The rest of the Petition focuses on an obviously irrelevant issue: Petitioners' subjective belief that ESI's networks are better than Aspire and Revolt. *See* Pet. at 10, 18. That Petitioners view ESI's content as superior to Aspire and Revolt does not even remotely suggest Comcast's decisions were motivated by racial bias (and a peculiar sort of racial bias, not against African Americans generally, but only against 100 percent African American owned companies). In fact,

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[7] As Petitioners acknowledge, the allegations regarding the Black Family Channel were already raised in a January 14, 2011 letter to the Commission from the National Coalition of African American Owned Media. Pet. 12 n.14. The Commission approved of Comcast's acquisition of NBCUniversal despite these allegations, and Petitioners offer no reason for the Commission to again consider these rehashed claims over five years later. *See* 26 FCC Rcd. at 4312 & n.461 (noting that a "number of commenters"—including the National Coalition of African American Owned Media and ESI—"have voiced concerns that the proposed transaction would harm viewpoint, program, and source diversity"); *id.* at 4316 ("Based on the record as a whole, we find that the Applicants have addressed the concerns that the transaction will harm viewpoint, program, and source diversity.").

Petitioners' focus on why ESI is supposedly so much better than Aspire and Revolt confirms that this Petition is really nothing more than a business dispute that has no connection at all to the *Comcast-NBCUniversal Order* or even to the Commission's more general program-carriage mandate. No rule precludes Comcast from using its editorial and business judgment to choose among one hundred wholly independent programming networks. Nor is it even plausible that racial animus played a role in the selection among candidates—*all of which were African American owned networks*—for the first two MOU channel slots.

When Comcast declined to carry ESI's networks, ESI did not seek to improve its content, but instead turned to the courts—and now the Commission—in a transparent effort to pressure Comcast with false and outrageous allegations of racial discrimination. As part of this misguided and unseemly campaign, Petitioners have not hesitated to make absurd claims of fraud, corruption, and impropriety—including about respected civil rights organizations and this Commission—even though they have no evidence whatsoever to support their allegations. Indeed, while the Petition refrains from frontally accusing the Commission of impropriety and corruption, as Petitioners have done in their lawsuit in the *Charter* case, the Petition is replete with innuendo to the same effect, including a multipage footnote taking aim at the Commission, current and former Commissioners, Al Sharpton, and Representative James Clyburn. *See* Pet. at 3 n.2; *see also id.* at 21–22.

In any event, the Commission does not—and cannot—sit as a television super-critic, picking and choosing whose channel content is better and then ordering cable operators to make business decisions accordingly. On the contrary, the Commission has recognized that the question of which new-channel proposals to select for further development pursuant to the MOU is a "creative" determination that must be "dictated by Comcast-NBCU's individual evaluation of each proposal under consideration." *Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4317. Indeed, Comcast's editorial judgment in selecting the right mix of content for its subscribers is protected by the First Amendment. *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993

(D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage."); *see also Comcast-NBCUniversal Order*, 26 FCC Rcd. at 4318 (noting that the First Amendment, federal statutes, and Commission precedent "limit [the Commission's] ability to dictate the programming policies of . . . licensees").

III. Conclusion

The Petition should be dismissed.

Respectfully submitted,
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April 4, 2016

DECLARATION OF JENNIFER GAISKI

I, Jennifer Gaiski, declare as follows:

1. I have worked for Comcast Cable ("Comcast") since 1997 in positions involving programming and content acquisition. My current title is Senior Vice President, Content Acquisition. My responsibilities include negotiating and administering Comcast's program carriage contracts.

2. I was involved in the negotiations of Comcast's agreements with the cable networks Aspire and Revolt. When it agreed to launch Aspire and Revolt, Comcast obtained representations from both Aspire and Revolt that they are majority owned by African Americans.

3. Aspire and Revolt were selected because, in Comcast's judgment, they offered the most compelling combination of content, leadership experience, and overall value proposition for our customers.

4. Comcast does not have an equity interest in either Aspire or Revolt. Neither Aspire nor Revolt is an Affiliate of Comcast.

5. Prior to entering into program carriage contracts with Comcast, neither Aspire nor Revolt was carried by Comcast and neither Aspire nor Revolt was an Affiliate of one of the top 15 programming networks, as measured by annual revenue.

6. I have personally met with Byron Allen and Entertainment Studios, Inc. ("ESI") on several occasions to discuss Comcast's potential carriage of ESI's networks. Comcast has not refused to meet with Mr. Allen or any other representatives of ESI.

7. Comcast has considered all of the proposals for carriage of ESI's networks that have been submitted to it to date, but Comcast has concluded that ESI's networks lacked sufficient consumer interest to warrant the costs in both dollars and bandwidth that carriage of those channels would entail.

8. ESI did not make a formal proposal to Comcast during the 2011-2012 solicitation process that ultimately resulted in the selection of Aspire and Revolt, but Comcast nonetheless considered ESI's networks as part of that process.

9. Based on my involvement in programming and content acquisition and in this negotiation at the time, my clear understanding is that Comcast did not seek an ownership interest in the Black Family Channel, and Comcast did not attempt to condition additional carriage of the network on obtaining such an ownership interest.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this day of April 4, 2016 in Philadelphia, Pennsylvania.

Jennifer Gaiski

DECLARATION OF MICHAEL R. HUSTON

I, Michael R. Huston, declare as follows:

1. I am an attorney at Gibson, Dunn & Crutcher LLP in Washington, D.C. I am a member of the bars of the District of Columbia and California. I am counsel to Comcast Corporation in *NAAAOM v. Comcast Corp.*, C.D. Cal., No. 2:15-cv-01239.

2. Attached as Exhibit A to this declaration is a true and correct copy of the order of the district court in *NAAAOM v. Comcast*, dated August 5, 2015, granting defendants' motion to dismiss.

3. Attached as Exhibit B to this declaration is a true and correct copy of the plaintiffs' original complaint (without exhibits) in *NAAAOM v. Comcast*, filed on February 20, 2015.

4. Attached as Exhibit C to this declaration is a true and correct copy of the plaintiffs' first amended complaint in *NAAAOM v. Comcast*, filed on September 21, 2015.

5. Attached as Exhibit D to this declaration is a true and correct copy of defendant Comcast's memorandum of points and authorities in support of its motion to dismiss the first amended complaint in *NAAAOM v. Comcast*, filed on October 21, 2015.

6. Attached as Exhibit E to this declaration is a true and correct copy of the plaintiffs' complaint in *NAAAOM v. Charter Commc'ns, Inc.*, C.D. Cal., No. 2:16-cv-00609, dated January 27, 2016, which names the Federal Communications Commission as a defendant.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this day of April 4, 2016 in Washington, District of Columbia.

Michael R. Huston

EXHIBIT A

JS-6

United States District Court
Central District of California
Western Division

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, *et al.*,

Plaintiffs,

v.

COMCAST CORPORATION, *et al.*,

Defendants.

CV 15-01239 TJH (MANx)

Order

The Court has considered the motions of Time Warner Cable and Comcast Corporation, National Association for the Advancement of Colored People, National Urban League, Inc., Al Sharpton, National Action Network, Inc., and Meredith Attwell Baker's to dismiss, together with the moving and opposing papers.

Since there is no applicable federal statute governing personal jurisdiction, district courts apply the law of the state in which they sit. *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). As such, jurisdictional analysis under California law and federal due process is the same, and this Court may exercise jurisdiction under any basis allowable under the U.S. Constitution. *Yahoo! Inc.*, 433 F.3d at 1205.

Federal due process requires that the defendant have certain minimum contacts with the forum state such that the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945). There is a three-part test to assess whether a defendant has sufficient contacts with the forum state to be subject to specific personal jurisdiction: (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or purposefully avail himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must arise out of or relate to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice. *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015). The plaintiff bears the burden of proving the first two prongs. *Picot*, 780 F.3d at 1212. Should the plaintiff satisfy the first two prongs, the burden shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would be unreasonable. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).

As to the first prong, one of two tests guides the Court's jurisdictional analysis. *Picot*, 780 F.3d at 1212. For contract claims, the question is whether a defendant has purposefully availed himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Picot*, 780 F.3d at 1212. For tort claims, there is a three part "effects" test derived from *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (9th Cir. 1984). A defendant has purposefully directed his activities at the forum if he: (1) committed an intentional act, (2) expressly aimed at the forum state, and (3) caused harm that the defendant knew was likely to be suffered in the forum state. *Calder*, 465 U.S. at 783.

Plaintiffs' claims sound in tort, and, thus, the "purposeful direction" test applies.

The plaintiffs have failed to plead sufficient facts to show that this Court has personal jurisdiction over defendants National Urban League, National Action Network,

the National Association for the Advancement of Colored People, Al Sharpton and Meredith Attwell Baker. As to these defendants, none of the traditional bases for personal jurisdiction have been established. Additionally, the plaintiffs have failed to show that these defendants' contacts with California establish, either, general or specific jurisdiction. These defendants are dismissed.

In considering a motion to dismiss, all material allegations in the complaint are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009). However, a complaint must contain sufficient facts to state a "plausible" claim for relief. *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035,1041 (9th Cir. 2010). A claim is facially plausible when the facts to support it allow the court to reasonably infer that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 1949. This requires more than a possibility that the defendant has acted unlawfully. *Iqbal*, 556 U.S. at 1949. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014).

Accepting all of the factual allegations in the complaint as true, the plaintiffs have failed to allege any plausible claim for relief.

It is Ordered, that the motions to dismiss be, and hereby are, **Granted**.

Date: August 5, 2015

Terry J. Hatter, Jr.
Senior United States District Judge

EXHIBIT B

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

National Association of African-American Owned Media, a California limited liability company; and Entertainment Studios Networks, Inc., a California corporation,

Plaintiffs,

v.

Comcast Corporation, a Pennsylvania corporation; Time Warner Cable Inc., a Delaware corporation; National Association for the Advancement of Colored People, a New York corporation; National Urban League, Inc., a New York corporation; Al Sharpton, an individual; National Action Network, Inc., a New York corporation; Meredith Attwell Baker, an individual; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01239

COMPLAINT FOR:

1) RACIAL DISCRIMINATION IN VIOLATION OF 42 U.S.C. § 1981; AND

2) CONSPIRACY TO VIOLATE 42 U.S.C. § 1981;

AND FOR DAMAGES AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

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Plaintiffs National Association of African-American Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege against Defendants Comcast Corporation ("Comcast"), Time Warner Cable, Inc. ("Time Warner Cable"), National Association for the Advancement of Colored People ("NAACP"), National Urban League, Inc. ("National Urban League"), Reverend Al Sharpton ("Sharpton"), National Action Network, Inc. ("National Action Network"), Meredith Attwell Baker; and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

1. This case is about racial discrimination in the contracting process by Defendants Comcast and Time Warner Cable—the two largest cable television companies in the United States—against 100% African American–owned media. These companies are preparing to merge into what will be the largest pay-television distributor in the United States.

2. Plaintiff Entertainment Studios is a 100% African American–owned media company involved in the production and distribution of television programming through broadcast television, its seven cable television channels, and its subscription-based internet service. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States, and is a victim of this racial discrimination by Comcast and Time Warner Cable.

3. African Americans comprise 13% of the U.S. population and represent more than $1 trillion in consumer spending power. Both Comcast and Time Warner Cable profit greatly by providing television service to African Americans. When combined with Time Warner Cable, Comcast would become the largest pay television distributor in the United States, with nearly one-third (1/3) of all television homes. (In fact, Comcast must divest itself of nearly 2.5 million

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customers to remain at the 30 million customer cap that the FCC will require for merger approval.)

4. Comcast and Time Warner Cable collectively spend approximately $25 billion annually for the licensing of pay-television channels and advertising of their products and services ($20 billion licensing and $5 billion advertising), yet 100% African American–owned media receives less than $3 million per year.

5. In connection with its 2010 bid to acquire NBC-Universal, Comcast was criticized for its refusal to do business with 100% African American–owned media. In response, Comcast entered into what it termed "voluntary diversity agreements," *i.e.*, memoranda of understanding ("MOUs"), with non-media civil rights groups, including the other Defendants herein: NAACP; National Urban League; Al Sharpton; and Al Sharpton's National Action Network.

6. Defendants NAACP, National Urban League, Al Sharpton and National Action Network entered into the MOUs in order to facilitate Comcast's racist practices and policies in contracting—or, more accurately, refusing to contract—with 100% African American–owned media companies. The MOUs are a sham, undertaken to whitewash Comcast's discriminatory business practices. Comcast uses the MOUs to perpetuate discrimination against 100% African American–owned media in contracting for channel carriage and advertising.[1]

7. In fact, to date, the only 100% African American–owned channel Comcast has agreed to broadcast is the Africa Channel, with only limited distribution and channel carriage fees. But the Africa Channel is owned by Paula Madison, the former Executive Vice President and Chief Diversity Officer of Comcast/NBC-Universal, who was directly involved in putting together the sham

[1] A carriage agreement is a contract between a multichannel video programming distributor, such as Comcast and Time Warner Cable, and a video programming vendor, like Entertainment Studios, granting the distributor the right to "carry," that is, distribute, the programmer's content.

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MOUs and obtaining government approval for the Comcast acquisition of NBC Universal, thus creating a serious conflict of interest. In other words, aside from a channel that is owned and operated by the former Comcast/NBC-Universal executive who authored the MOUs, Comcast has not launched a single 100% African American–owned channel—by way of the MOUs or otherwise.

8. To obtain support for the NBC-Universal acquisition and for its continued racist policies and practices, Comcast made large cash "donations" to the non-media groups that signed the MOUs. For example, Comcast has paid Reverend Al Sharpton and Sharpton's National Action Network over $3.8 million in "donations" and as salary for the on-screen television hosting position on MSNBC that Comcast awarded Sharpton in exchange for his signature on the MOUs, another blatant example of conflict of interest. But Sharpton and his organization, like all of the other groups that entered into the sham MOUs with Comcast, are not television channel owners and do not operate in the television channel business. They do not produce original television programming, or operate television channels, unlike Entertainment Studios, which does both.

9. Ironically, as widely reported in major news outlets such as *The New York Times*, Comcast spent millions of dollars to pay non-media civil rights groups to support its acquisition of NBC-Universal, while at the same time refusing to do business with 100% African-American owned media companies. These payments were a ruse made with an ulterior motive: To make Comcast look like a good corporate citizen while it steadfastly refused to contract with 100% African American–owned channels.

10. With the MOUs in hand, Comcast proceeded to segregate white-owned media businesses and 100% African American–owned media businesses, by creating two separate paths for contracting for channel carriage: one for white-owned channels (the "White Process"); and a separate, but not equal, process for 100% African American–owned channels (the "MOU/Minority Process").

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11. The MOU/Minority Process and the White Process are distinctly unequal. Comcast limits the number of carriage agreements it will enter into through the MOU/Minority Process and offers inferior contracting terms. By relegating 100% African American–owned media to the MOU/Minority Process, Comcast thereby affords them inferior or no contracting opportunities.

12. Comcast refuses to treat 100% African American–owned media companies, including Entertainment Studios, the same as similarly-situated white-owned media companies. Comcast has admitted that it is "impressed" by Entertainment Studios' programming and channels, but has relegated Entertainment Studios to the MOU/Minority Process, excluding Entertainment Studios from obtaining carriage like its white counterparts.

13. Comcast has, in essence, created a "Jim Crow" process with respect to licensing channels from 100% African American–owned media. Comcast has reserved a few spaces for 100% African American–owned media in the "back of the bus" while the rest of the bus is occupied by white-owned media companies. This is the epitome of racial discrimination in contracting.

14. 100% African American–owned channels are being denied the same opportunity to contract with Comcast as white-owned channels. Comcast is intentionally treating 100% African American–owned media differently on account of race.

15. Comcast's racial animus is also demonstrated by its own statements: On one of the many occasions when Entertainment Studios attempted to contract with Comcast, a Comcast executive told Entertainment Studios: "We're not trying to create any more Bob Johnsons," *i.e.*, no more pay days for Black media entrepreneurs.

16. Bob Johnson is an African American and the founder of Black Entertainment Television ("BET"), a television network targeting African American audiences. In 2001, Mr. Johnson sold BET to Viacom for $3 billion.

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17. Comcast refused to negotiate with Entertainment Studios because Comcast did not want to create any more successful Black media entrepreneurs, like Bob Johnson. Entertainment Studios has been rejected in its attempts to contract with Comcast because its founder and owner, Byron Allen, is African American.

18. Comcast has discriminated, and is discriminating, against Entertainment Studios on account of race, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. Defendants NAACP, National Urban League, Al Sharpton and National Action Network conspired with Comcast to violate Entertainment Studios' civil rights by entering into sham "diversity" agreements that enable Comcast to perpetuate its racist policies and practices. White-owned channels are not relegated to the MOU/Minority Process and are not denied carriage on account of Comcast claiming that it has met its "diversity obligations" under the MOU/Minority Process. The sham MOUs have perpetuated the Comcast agenda whereby 100% African American-owned media companies receive less than $3 million of the $15 billion Comcast spends annually on channel carriage and advertising.

19. Comcast has engaged in, and is engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under Section 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

20. The "diversity" commitments Comcast made through the MOUs are fraudulent. The MOUs were purportedly intended to result in the launch of so-called "minority" networks. In reality, the networks Comcast has launched pursuant to the MOUs are owned, controlled, and backed by white-owned media and money. And Comcast still refuses to launch any 100% African American–owned media channels, other than one that is owned and operated by the former Comcast/NBC-Universal executive who oversaw the execution of the MOUs.

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21. White-owned media in general—and Comcast in particular—has worked hand-in-hand with governmental regulators to perpetuate the exclusion of 100% African American–owned media from contracting for channel carriage and advertising. This has been done through, among other things, the use of "token fronts" and "window dressing"—African American celebrities posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses.

22. For example, one of the "Black channels" is actually owned by Highbridge Capital, which is run by a former Comcast executive, Payne Brown. Highbridge Capital is also a subsidiary of JP Morgan, whose Board of Directors includes Comcast's President and COO, Steve Burke. The other "Black channel" is actually owned by Intermedia Partners, which is owned/controlled by Leo Hindery, a long-time friend of Comcast's CEO, Brian Roberts.

23. Similarly, as one of its MOU "commitments" to the Hispanic community, Comcast launched "Baby Americas," a non–Hispanic owned channel. Bill Burke—brother of Comcast's President and COO, Steve Burke—is on the Board of Directors of Baby Americas, which is further evidence of Comcast's blatant conflict of interest and an example of how Comcast uses the MOUs to conduct racial discrimination in contracting, while also benefitting insiders and family members.

24. Comcast is now proposing to acquire Time Warner Cable for $45 billion. If this deal is approved by government regulators, it would combine the country's two biggest cable TV operators. The combined Comcast / Time Warner Cable entity would control approximately a third of the U.S. pay-television market (*i.e.*, 30 million subscribers out of 100+ million), including 16 of the top 20 advertising markets in the country, such as New York, Los Angeles and Chicago.

25. The proposed acquisition is part of a growing national trend of media consolidation that will further concentrate racial discrimination in contracting and

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eliminate diverse voices, contrary to the public interest and in violation of the First Amendment to the U.S. Constitution.

26. Comcast is a major player in Washington, D.C. and has used its clout and money to buy approval for its acquisitions and sweep its racist practices under the rug. Comcast's chief lobbyist and executive vice president, David Cohen, is a powerful political fundraiser and the mastermind behind Comcast's many conflicts of interest recounted herein. Mr. Cohen has attended state dinners at the White House honoring foreign dignitaries and has had President Obama as a guest in his home on so many occasions that the President recently joked, "I have been here so much, the only thing I haven't done in this house is have Seder dinner." Mr. Cohen's boss, Comcast's Chairman, Brian Roberts, plays golf with the President regularly and Comcast has raised millions of dollars for the elections of President Obama.

27. Comcast is devious in its manipulations: It influenced and secured favorable votes from government regulators—including Federal Communications Commission ("FCC") commissioner Defendant Meredith Attwell Baker—for approval of the Comcast/NBC-Universal transaction; and then hired Baker as a highly paid executive almost immediately after the deal was approved as a result of her vote. This is the very definition of conflict of interest and a blatant betrayal of the public trust by a highly placed governmental regulator.

28. 100% African American–owned media has been shut out by Comcast. Of the approximately $11 billion in channel carriage fees that Comcast pays to license television channels each year, less than $3 million is paid to 100% African American–owned media. Nor does 100% African American–owned media see much, if any, of the additional, approximate $4 billion Comcast spends each year on advertising.

29. Outside of the Africa Channel deal, Time Warner Cable does not distribute any channels that are owned and operated by 100 % African American–

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owned media. And in the face of the pending merger between Comcast and Time Warner Cable, Time Warner Cable has delegated channel carriage decision-making to Comcast—"gun jumping" the consummation of the Comcast / Time Warner Cable merger in violation of federal antitrust laws. Time Warner Cable has thus adopted and agreed with Comcast's racist policies and practices in connection with contracting for channel carriage, including the dual paths for carriage (*i.e.* the White Process vs. the MOU/Minority process).

30. African Americans comprise 13% of the U.S. population and represent more than $1 trillion in consumer spending power, yet 100% African American–owned media companies cannot get Comcast or Time Warner Cable to distribute their channels on their television systems. While Comcast and Time Warner Cable, two of the world's largest media companies, extract billions from African American consumers, they refuse to contract with, and present their television subscribers with, channels from 100% African American–owned media companies—including Entertainment Studios. Instead, Comcast and Time Warner Cable exclude 100% African American–owned media companies from contracts for channel carriage and advertising.

28. This lawsuit is brought pursuant to § 1981 of the Civil Rights Act, which provides that all persons in the United States shall have the same right to make and enforce contracts as is enjoyed by white persons. Section 1981 prohibits racial discrimination in contracting and applies to both non-governmental and governmental discrimination.

29. Racial discrimination in contracting is an ongoing practice in the media industry. NAAAOM seeks to eliminate this discrimination, and to obtain equality in contracting for 100% African American–owned media.

30. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its

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own right. The interests at stake in this litigation—namely, the right of 100% African American–owned media to make and enforce contracts in the same manner as their white-owned counterparts—are germane to NAAAOM's purpose. Because NAAAOM seeks only injunctive relief, the individual participation of its members is not required.

31. Defendants' ongoing refusal to contract with Entertainment Studios constitutes unlawful racial discrimination in violation of § 1981, for which Entertainment Studios seeks to recover monetary damages resulting from Defendants' racial discrimination. Plaintiffs NAAAOM and Entertainment Studios also seek injunctive relief prohibiting Defendants from discriminating against African American–owned media companies on the basis of race in contracting for channel carriage and advertising.

PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

32. Historically, because of the lack of distribution/advertising support and economic exclusion, 100% African American–owned media has been forced either to (i) give away significant equity in their enterprises, (ii) pay exorbitant sums for carriage, effectively bankrupting the business, or (iii) go out of business, all pushing 100% African American–owned media to the edge of extinction.

33. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

34. NAAAOM was created and is working to obtain for 100% African American–owned media the same contracting opportunities as their white counterparts for distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of truly 100% African American–owned media in contracting, the same as white-owned media.

35. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California.

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Entertainment Studios is a 100% African American–owned television production and distribution company. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States.

36. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor / comedian / media entrepreneur. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his career "on-screen," Allen developed a keen understanding of the "behind the scenes" television business, and over the past 22+ years he has built Entertainment Studios into a successful, independent media company.

37. Entertainment Studios has carriage contracts with more than 40 television distributors nationwide, including major distributors such as Verizon, Century Link, and RCN. These television distributors broadcast Entertainment Studios' networks to their combined 7.5 million subscribers.

38. Entertainment Studios owns and operates seven, high definition television networks (channels), six of which were launched to the public in 2009 and one in 2012. Entertainment Studios produces, owns, and distributes over 32 television series on broadcast television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and won, the Emmy award. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

39. In December 2012, Entertainment Studios launched "Justice Central," a 24-hour, high definition court/informational channel featuring several Emmy-nominated and Emmy-award winning legal/court shows. After just two years, Justice Central has already proved itself a successful, high-demand channel. Justice

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Central has boasted tremendous ratings growth across key television viewing periods and demographics.

B. Defendants

40. Comcast Corporation is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. Comcast also has an office, is registered to do business and operates in Los Angeles, California.

41. Time Warner Cable, Inc. is a Delaware corporation, with its principal place of business in New York, New York. Time Warner Cable also has an office, is registered to do business and operates in Los Angeles, California.

42. National Association for the Advancement of Colored People ("NAACP") is a New York not-for-profit corporation, with national headquarters in Baltimore, Maryland. NAACP also has a regional branch that has an office and operates in Los Angeles, California.

43. National Urban League, Inc. is a New York not-for-profit corporation, with its principal place of business in New York, New York. National Urban League also has a regional affiliate that has an office, is registered to do business and operates in Los Angeles, California.

44. Reverend Al Sharpton is an individual residing in New York, New York. Sharpton is the founder and President of Defendant National Action Network, Inc.

45. National Action Network, Inc. is a New York not-for-profit corporation, with its principal place of business in Harlem, New York. National Action Network also has a regional chapter that has an office, is registered to do business and operates in Los Angeles, California.

46. Meredith Attwell Baker is a former FCC Commissioner and is an individual residing in Washington, D.C.

47. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to

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Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

C. Jurisdiction & Venue

48. This case is brought under a federal statute, Section 1981 of the Civil Rights Act; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because Defendants reside in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

FACTS

A. Racial Discrimination In Contracting

49. Comcast is a global media giant. It owns NBC Television, Universal Pictures, Universal Studios, multiple (approximately 30) pay television channels (*e.g.*, USA Network, Bravo Network, E! Network, etc.), and it is the largest cable company and internet service provider to consumers in the United States. Comcast provides subscription television services to approximately 22 million subscribers—more than any other cable television distributor in the United States.

50. Comcast collects billions of dollars from its television subscribers annually. A substantial portion comes from African American consumers.

51. Racial discrimination in contracting is an ongoing practice in the media industry with far-reaching adverse consequences. It effectively excludes 100% African American–owned media companies and African American individuals, and their diverse viewpoints, from the public airwaves, which is distinctly not in the public interest.

52. 100% African American–owned media has been shut out from doing business with Comcast despite significant efforts to do so. Like many other 100%

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African American–owned channels that have tried to secure cable carriage during Comcast's 50+ year history, Entertainment Studios has had multiple meetings for channel carriage with Comcast but, like all of the others, to no avail.

53. In the more than six years Entertainment Studios has been reaching out to Comcast for carriage, Comcast has given Entertainment Studios the false impression that its channels are on Comcast's "short list," and provides a variety of different excuses for its refusal to carry any of Entertainment Studios' channels. Comcast has been playing a game of "whack-a-mole" with Entertainment Studios—each time Entertainment Studios jumps a pretextual hurdle created by Comcast (*e.g.*, Comcast executive, Jennifer Gaiski, required Entertainment Studios to present empirical data and secure support "in the field" so that she could present such material to Comcast senior management, Greg Rigdon and Neil Smit), Comcast replaces it with a new obstacle. Although Entertainment Studios has complied with each of Comcast's demands, Comcast still refuses to launch any 100% African American–owned channels, including Entertainment Studios' channels.

54. For example, despite the demonstrated success of Entertainment Studios' Justice Central on their competitors' television platforms, both Comcast and Time Warner Cable (at the order of Comcast) refuse to license Justice Central for carriage on their television platforms. Justice Central's double- to triple-digit ratings growth outperformed the vast majority of networks that Comcast and Time Warner Cable pay substantial license fees to carry. Indeed, between the first quarter of 2013 and the fourth quarter of 2014, Justice Central boasted huge ratings growth on AT&T's television platform, as follows:

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Justice Central – AT&T U-Verse Ratings Growth

Daypart:	Air Time:	% Growth 1st Qtr. 2013 to 4th Qtr. 2014:
Early Fringe	4-7pm	+38%
Prime Access	7-8pm	+21%
Prime	8-11pm	+53%
Late Fringe	11pm-2am	+552%
Overnight	2-6am	+295%

55. Of the approximately $10 billion in content fees that Comcast pays to license channels and advertise each year, less than $3 million is paid to 100% African American–owned media. Even the token payments Comcast makes to 100% African American–owned media companies are a charade. Comcast pays minimal amounts to license and distribute the Africa Channel, which is owned and operated by a former Comcast/NBC-Universal executive/insider and one of the architects of the MOUs Comcast uses to perpetuate its racial discrimination in contracting.

56. Time Warner Cable likewise discriminates against 100 % African American–owned media. Following the announcement of the Comcast / Time Warner Cable merger, in May 2014, a Time Warner Cable board member told Entertainment Studios that any channels to be launched on Time Warner Cable's television platforms needed to be expressly approved by Comcast's David Cohen—such conduct constitutes "gun jumping" in violation of federal antitrust law. In other words, Time Warner Cable has delegated channel carriage decision-making authority to Comcast and has adopted and agreed with Comcast's racist policies and practices in contracting for carriage, including the dual paths to carriage (*i.e.*, the White Process and the MOU / Minority Process).

57. Comcast programming executive, Jennifer Gaiski, asked Entertainment Studios who it was in discussions with at Time Warner Cable about launching its

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channels. Soon after Entertainment Studios disclosed that it had advanced negotiations with Time Warner Cable executive, Melinda Witmer (who was presenting Entertainment Studios' information to Time Warner Cable President and COO, Robert Marcus), Entertainment Studios' channel launch opportunity was shut down by Time Warner Cable under orders from Comcast. Based on Comcast's instructions, Entertainment Studios has not heard anything further from Time Warner Cable.

58. By virtue of this exclusion by both Comcast and Time Warner Cable, 100% African American ownership in mainstream media is nearly extinct; and this exclusion is self-perpetuating.

B. <u>The MOUs Are Fraudulent Shams</u>

59. In collusion with the FCC and non-media civil rights advocacy groups, Comcast has manipulated ways to perpetuate its exclusion of 100% African American–owned channels.

60. In 2010, Comcast announced plans to merge with NBC-Universal. Opponents of the merger voiced concerns about the lack of diversity in Comcast's channel offering; Comcast did not distribute any channels owned by 100% African American–owned media companies.

61. As with the pending Comcast / Time Warner Cable merger, the Comcast/NBC-Universal merger was subject to regulatory approval by the FCC and the Department of Justice. Comcast's racist practices and policies jeopardized the approval of the NBC-Universal acquisition.

62. As has been well documented in the media, in order to gain approval of its acquisition of NBC-Universal, Comcast "stacked the deck." It colluded with government regulators and conspired with and paid off non-media civil rights groups in order to secure their compensated support and silence its critics.

63. Just 90 days after the FCC approved the Comcast/NBC-Universal transaction, Meredith Attwell Baker, one of only three FCC commissioners who had

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voted in favor of the merger, was hired as a Senior Vice President at Comcast. Comcast rewarded this helpful government regulator with an executive position and a substantially higher salary after she used her power at the FCC to Comcast's benefit. This executive position and compensation package clearly would not have been granted by Comcast had Ms. Baker voted against the merger. This is another blatant and horrific conflict of interest and betrayal of the public trust.

64. Comcast has given millions in monetary "contributions" to various minority special interest groups in order to "buy" support for its expansion. Comcast "donated" funds to at least 54 different groups that went on publicly to endorse the Comcast/NBC-Universal deal by sending Comcast-authored letters to the FCC or by entering into fraudulent, sham MOUs with Comcast.

65. The MOUs were given the appearance of legitimacy because they were approved by minority interest groups—NAACP, National Urban League, and Al Sharpton's National Action Network, none of which own or operate any television channels, and all of which accepted large donations/pay-offs for their signatures. This is another blatant and horrific conflict of interest and betrayal of the public's trust.

66. Each of the signatories to the MOU between Comcast and the "African American Leadership Organizations" were paid by Comcast in the time leading up to the Comcast/NBC-Universal deal. Comcast paid $30,000 to the NAACP, $835,000 to the National Urban League, and $140,000 to Al Sharpton's National Action Network. Comcast also paid hundreds of thousands of dollars to the National Urban League's various regional affiliates. This is yet another blatant conflict of interest and betrayal of the public trust.

67. In addition to its payments to Al Sharpton's National Action Network, Comcast gave Al Sharpton a prime-time television series with Sharpton as host on Comcast's MSNBC, for which Sharpton has been paid approximately $750,000 per year according to public records. Despite the notoriously low ratings that

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Sharpton's show generates, Comcast has allowed Sharpton to maintain his hosting position for more than three years in exchange for Sharpton's continued public support for Comcast on issues of diversity.

68. Sharpton has a business model and track record of obtaining payments from corporate entities in exchange for his support. Sharpton is a vocal member of the African-American community whose public support can be secured for a price. The National Legal & Policy Center has stated that Sharpton "specializes in shakedowns" of corporations—either they "contribute" thousands of dollars to Sharpton's National Action Network or risk losing Sharpton's support and influence in the African-American community. Sharpton has even gone so far as to organize boycotts and protests against companies unless and until those companies make monetary contributions to his National Action Network; but once the money comes in, the protests cease.

69. Comcast paid Sharpton so that he would publicly endorse the NBC-Universal deal and divert attention away from Comcast's racial discrimination in contracting. In exchange, Sharpton's National Action Network and other non-media minority interest groups supported Comcast before the FCC with very little understanding about the merger they were supporting or expertise in the media business.

70. In exchange for these payouts and other favors, Defendants NAACP, National Urban League, Al Sharpton and his National Action Network agreed to enter into sham "diversity agreements"—MOUs—for the purpose of facilitating Comcast's racial discrimination in contracting. Defendants NAACP, National Urban League, and Al Sharpton's National Action Network signed onto the MOUs with Comcast knowing—and agreeing—that Comcast would use the MOUs to perpetuate civil rights violations against 100% African American–owned media companies, including Entertainment Studios.

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71. Pursuant to the fraudulent MOUs, Comcast purportedly agreed to enhance its programming diversity by increasing the number of minority-owned networks it distributes. In reality, the MOUs are a smokescreen for Comcast's racially discriminatory business practices including, specifically, its refusal to contract for channel carriage or advertising with 100% African American–owned media.

72. NAACP, National Urban League, Sharpton, and National Action Network knew (and agreed) that Comcast would use the MOUs as a vehicle to perpetuate its racial discrimination in contracting. In particular, Defendants entered into the MOUs knowing that by doing so, Entertainment Studios, and other 100% 100% African American–owned media companies, would be shut out from contracting with Comcast for carriage.

73. In light of the widespread concerns about Comcast's failure to do business with African American–owned media companies, Comcast had a problem. The sham MOUs solved it: Through the MOUs, Comcast purportedly agreed to enter into carriage agreements with minority-owned media companies, but the channels that were ultimately launched were fronts and were not truly 100% African American owned.

74. Without the MOUs, Comcast would have had to actually do business with 100% African American–owned media companies in order to persuade the government to approve its merger with NBC-Universal. And without wielding the MOUs, Comcast would have had no other way to legitimize its racist practices, and would instead have to contract in good faith with 100% African American–owned media companies, such as Entertainment Studios.

75. Entertainment Studios' programming has proved popular among viewers, and even has garnered Emmy nominations and wins. Entertainment Studios sells its channels to dozens of other programming distributors and television stations, which distribute Entertainment Studios' channels to more than 7.5 million

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subscribers. Comcast has even acknowledged that Entertainment Studios' channels are good enough for carriage on its television platforms.

76. Pursuant to the MOUs, Comcast has launched two supposedly African American–owned channels. But, by design, these channels are not 100%, or even majority-owned/controlled, by African Americans.

77. The African American–owned channels that Comcast has launched are backed and controlled by white-owned businesses. Comcast has given African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting.

78. Entertainment Studios did not know that Comcast was using the MOUs as a vehicle to perpetuate racial discrimination in contracting until recently. In November 2014, Entertainment Studios first discovered that Comcast had set up dual paths for negotiating for carriage (one for white-owned media and one for African American–owned media) when it was told by Comcast that it would be relegated to the MOU/Minority Process.

79. In November 2014, a Comcast executive told Entertainment Studios that although its channels were good enough for carriage on Comcast's platform, Entertainment Studios would have to wait to be part of the "next round of [MOU] considerations," *i.e.*, the MOU/Minority Process. In other words, Comcast told Entertainment Studios that it would consider contracting to carry Entertainment Studios' channels only to the extent that the carriage agreement would satisfy Comcast's obligation to launch minority-owned networks pursuant to the MOUs. But the MOU/Minority Process has never resulted in the launch of 100% African American–owned channels.

80. Entertainment Studios is restricted to applying for carriage with Comcast via the MOU/Minority Process not because of the nature of its channels—which are broad market with global appeal, and do not target African American viewers—but because it is 100% African American–owned. But for the existence of

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the MOUs, it is reasonably probable that Comcast would have contracted with Entertainment Studios for carriage.

81. For racial reasons alone, Entertainment Studios is forced to participate in a discriminatory process. This is racial discrimination in contracting, which constitutes a violation of 42 U.S.C. § 1981.

82. The MOUs enable Comcast to tout a non-existent "commitment" to racial diversity, without granting 100% African American–owned media access to Comcast's national television platform. All the MOUs have done is allow Comcast to legitimize its racist policies and practices so it can continue to refuse to do business with 100% African American–owned media.

83. According to Comcast, Entertainment Studios must go through the MOU/Minority Process for obtaining channel carriage. This prevents 100% African American–owned media businesses, like Entertainment Studios, from being treated fairly and equally to their white-owned/controlled counterparts.

84. The MOUs thus enhance Comcast's discriminatory practices against 100% African American–owned channels. Comcast has used the MOUs to create a segregated and unequal path for 100% African American–owned channels to contract.

85. By contrast, white-owned media companies are able to contract with Comcast for carriage at any time via the White Process. Comcast refuses to contract with 100% African American–owned media companies—such as Entertainment Studios—through the White Process. The MOU/Minority Process constitutes intentional discrimination on its face.

86. In addition to these racial restrictions, Entertainment Studios faces further inequities in the terms and conditions Comcast offers to the channels it chooses through the MOU/Minority Process. Comcast has historically offered shorter-term deals and little, if any, in licensing fees to the channels it launches through the MOU/Minority Process. These less favorable contracting terms make it

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difficult—if not impossible—for the channels launched through the MOU/Minority Process to succeed.

87. By its words and actions, Comcast has made clear that it does not want to, and will not, contract with Entertainment Studios—the only 100% African American owned program provider/multi-channel owner in the country—unless government regulators force Comcast to do so.

88. Comcast has used other phony excuses to justify its racial discrimination. For example, it claims that it does not have the bandwidth to accommodate Entertainment Studios' channels or that it is not a buyer of new channels. But it has entered into carriage agreements with other, similarly situated white-owned channels.

89. Comcast further claims that there is no demand for Entertainment Studios' channels, but that is belied by the facts: Entertainment Studios' channels are distributed by other national television providers who are competitors of Comcast; and Entertainment Studios' Justice Central network has shown tremendous ratings growth.

90. Comcast also claims that it is interested in adding carriage only for news and sports channels. This is yet another phony excuse. Comcast has added other, non-news, non-sports channels while simultaneously refusing to contract with Entertainment Studios.

91. Comcast's refusal to contract with 100% African American–owned media, its implementation of dual paths for carriage (*i.e.*, one path for white-owned media and a separate "MOU/Minority Process" for African-American owned media), and its pretextual excuses evidence racist policies and practices in violation of Section 1981.

C. Comcast's Racial Animus

92. A major television channel distributor, like Comcast, has unique power to limit the viewpoints available in the public media. Comcast limits the diversity of

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television programming available to its subscribers by refusing to contract with 100% African American–owned media.

93. Comcast rejects 100% African American–owned channel vendors in favor of white-owned channel vendors. As set forth above, Comcast blocks entry into its television platform for 100% African American–owned media.

94. Entertainment Studios has been trying for more than six years to contract with Comcast for carriage of one or more of Entertainment Studios' seven channels. Comcast has refused and strung Entertainment Studios along.

95. On one of the many occasions on which Entertainment Studios reached out to Comcast, a Comcast executive stated that Comcast was "not going to create any more Bob Johnsons." In other words, Comcast stated it did not want to see another 100% African American–owned media company and channel owner, like Mr. Johnson, succeed.

96. By this lawsuit, Plaintiffs seek the same treatment in contracting for Entertainment Studios as Comcast provides to white-owned channels; and Entertainment Studios seeks damages as a result of racial discrimination in contracting.

D. <u>The Comcast / Time Warner Cable Merger</u>

97. In February 2014, Comcast announced plans to acquire Time Warner Cable for $45 billion. The deal was approved by the boards of both companies, but as with the Comcast/NBC-Universal transaction, it faces regulatory approval by the FCC and the Department of Justice.

98. Time Warner Cable currently provides cable television service to approximately 12 million subscribers. If the merger is approved by regulators, the combined Comcast and Time Warner Cable entity will serve approximately 30 million customers.

99. Post-merger, Comcast will control a huge percentage of the market for television channel distribution and broadband internet. It will have an even larger

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market share than AT&T will have if AT&T completes its pending acquisition of DirecTV.

100. This pay-TV merger, like the proposed AT&T acquisition of DirecTV, will result in more consolidation (and thus fewer options) in the industry. This affects not only subscribers, but also 100 % African American–owned channels.

101. In many cities where Comcast and Time Warner Cable have a share of the television distribution market, African Americans comprise a large part of the population. However, the availability of channels wholly owned by African Americans on Comcast's and Time Warner Cable's systems does not remotely reflect either company's subscriber base or viewership makeup.

102. Although Comcast's and Time Warner Cable's African American subscribers pay billions of dollars in yearly subscriber fees, Comcast and Time Warner Cable spend a combined $25 billion per year licensing channels and advertising their services, with less than $3 million being paid to 100% African American–owned media for either channel carriage or advertising.

103. Channel owners, like Entertainment Studios, are reliant upon the services of television channel distributors, like Comcast and Time Warner Cable, not only to realize television subscriber revenue, but also to reach television consumers themselves. By virtue of its control over the television distribution platform, Comcast effectively has control over the programming available to television viewers. If Comcast gets even bigger by acquiring Time Warner Cable, it will effectively control the channels and programs available to one-third of television viewers in the United States. Thus, if Comcast and Time Warner Cable continue to refuse to contract with 100% African American–owned media, they can prevent 100% African American–owned channels from reaching their 30 million subscribers.

104. Presently, Comcast spends upwards of approximately $11 billion in channel carriage fees each year. Time Warner Cable spends approximately $9

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billion in channel carriage fees each year. If Comcast's bid is approved, of the almost $20 billion spent for channel carriage by the combination of Comcast and Time Warner Cable, less than $3 million per year will be used to license (and broadcast to Comcast and Time Warner Cable's 30 million subscribers) channels from 100% African American–owned media. Meanwhile, Comcast and Time Warner Cable will continue to collect billions of dollars from television subscribers annually, a substantial portion coming from African Americans.

105. Comcast's 30% market share post-merger will include 16 of the top 20 advertising markets, including Los Angeles, New York and Chicago. Yet of the approximately $4 billion a year spent on television advertising by Comcast and Time Warner Cable, less than $3 million per year will be paid to 100% African American–owned media.

106. There is a statistic that highlights the inequity here: Comcast's Chairman, Brian L. Roberts, was paid $31 million in compensation in 2013 alone—ten times more than all of Comcast paid to 100% African American–owned media for channel carriage and advertising combined during the same period. Additionally, the CEO of Time Warner Cable during the same period (2013) was paid approximately $118 million, or more than 39 times the amount all of Time Warner Cable paid to 100% African American–owned media for channel carriage and advertising.

107. Entertainment Studios is being discriminated against on account of race in connection with contracting in violation of the Civil Rights Act. Without access to viewers and without licensing fees and advertising revenues from the largest video programming distributors in the country, this 100% African American–owned media business is being severely damaged.

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FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS

(42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Comcast & Time Warner Cable

A. Section 1981

108. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

109. Section 1981 of the Civil Rights Act, known as the Civil Rights Act of 1866, provides for the equality of citizens of the U.S. and prohibits racial discrimination in, among other things, contracting.

110. African Americans are a protected class under Section 1981. Entertainment Studios is a 100% African American–owned media business.

111. As alleged herein, Entertainment Studios attempted many times over many years to contract with Comcast to carry its channels, but Comcast has refused, providing a series of fraudulent, pretextual excuses. Yet Comcast has continued to contract with—and make itself available to contract with—similarly situated white-owned television channels.

112. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU/Minority Process, while white-owned businesses have been afforded the right to contract with Comcast through the more accessible White Process.

113. Comcast has dealt with Entertainment Studios in a markedly hostile manner and in a manner which a reasonable person would find discriminatory.

114. Time Warner Cable has likewise refused to contract with Entertainment Studios for channel carriage and advertising. In light of the pending merger between Comcast and Time Warner Cable, Time Warner Cable has delegated channel carriage decision-making authority to Comcast. Accordingly, Time Warner Cable engages in the same discriminatory conduct constituting a violation of 42

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U.S.C. § 1981 as does Comcast. Time Warner Cable has adopted and agreed with Comcast's racist policies and practices in connection with contracting for channel carriage, including the dual paths for carriage (*i.e.* the White Process vs. the MOU/Minority process). After Comcast demanded to know who Entertainment Studios was talking to at Time Warner Cable to get channel carriage, Time Warner suddenly closed the door (at the instruction of Comcast) on negotiations and shut out Entertainment Studios.

B. Damages

115. But for Comcast's refusal to contract with Entertainment Studios, Entertainment Studios would receive approximately $378 million in annual license fees for its seven channels—calculated using a conservative license fee of fifteen cents per subscriber per month for each channel for Comcast / Time Warner Cable's 30 million subscribers. If Defendants contracted in good faith, Entertainment Studios would also receive an estimated $200 million per year, per channel, in national advertising sales revenue, or a total of $1.4 billion per year, equaling a combined total of $1.8 billion in annual revenue.

116. Combining subscriber fees and advertising revenue, Entertainment Studios would generate approximately $1.8 billion in annual revenue from its carriage and advertising contracts with Comcast / Time Warner Cable. Moreover, with distribution on the largest television platform in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' channels.

117. Based on the revenue Entertainment Studios would generate if Defendants contracted with them in good faith, Entertainment Studios would be valued at approximately $20 billion.

118. Similarly-situated lifestyle and entertainment media companies are valued at higher amounts. But for Comcast's and Time Warner Cable's refusal to

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contract with Entertainment Studios, Entertainment Studios would have a similar valuation.

119. Accordingly, Comcast's unlawful discrimination has caused Entertainment Studios in excess of $20 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

SECOND CAUSE OF ACTION: CONSPIRACY TO VIOLATE 42 U.S.C. § 1981

(42 U.S.C. 1985(3))

By NAAAOM and Entertainment Studios Against Comcast, NAACP, National Urban League, Al Sharpton, National Action Network, and Meredith Attwell Baker

120. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

121. As set forth above, Comcast has violated 42 U.S.C. § 1981 by discriminating against Entertainment Studios on account of race in connection with contracting. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU/Minority Process, while white-owned businesses have been afforded the right to contract with Comcast through the more accessible White Process.

122. As described above, Defendants NAACP, National Urban League, Al Sharpton, National Action Network and Meredith Attwell Baker acted as co-conspirators by accepting cash payments, jobs and other favors from Comcast in exchange for their public support and approval of Comcast's racist policies and practices in contracting for channel carriage. In particular, Defendants intentionally agreed and conspired with each other to discriminate on the basis of race against 100% African American–owned media in connection with contracting, in violation

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of 42 U.S.C. § 1981. In furtherance of the conspiracy and to accomplish the goals of the conspiracy, Defendant Baker voted in favor of the Comcast / NBC-Universal merger and Defendants entered into sham MOUs, as set forth above. Defendants knew and agreed that Comcast intended to use the MOUs to discriminate against 100% African American–owned media companies in contracting for channel carriage by creating a separate path for carriage.

123. As set forth above, Defendants were motivated by racial animus.

124. As a direct and proximate result of the aforementioned conduct, Entertainment Studios has suffered damages in excess of $20 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages in excess of $20 billion according to proof at trial;
2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Comcast from discriminating against 100% African American–owned media companies, including Entertainment Studios, based on race in connection with contracting for carriage and advertising;
3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Defendants' net worth;
4. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and
5. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

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DATED: February 20, 2015

Respectfully Submitted,

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury pursuant to the Seventh Amendment of the United States Constitution.

DATED: February 20, 2015 MILLER BARONDESS, LLP

By: */s/ Louis R. Miller*
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EXHIBIT C

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN AMERICAN–OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation,

Plaintiffs,

v.

COMCAST CORPORATION, a Pennsylvania corporation; TIME WARNER CABLE, INC., a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01239-TJH-MAN

FIRST AMENDED COMPLAINT FOR RACIAL DISCRIMINATION IN VIOLATION OF 42 U.S.C. § 1981; AND FOR DAMAGES AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Plaintiffs National Association of African American–Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege against Defendants Comcast Corporation ("Comcast"), Time Warner Cable, Inc. ("Time Warner Cable"), and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

1. This case is about racial discrimination in contracting by Defendants Comcast and Time Warner Cable, two of the largest cable television companies in the United States. It involves refusals to contract and contracting on unequal and discriminatory terms.

2. Plaintiff Entertainment Studios is a 100% African American–owned media company involved in the production and distribution of television programming through broadcast television, its seven cable television channels, and its subscription-based internet service. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States (because the other 100% African American–owned media companies have been shut out and were eventually forced out of business).

3. Comcast and Time Warner Cable refuse to do business with truly African American–owned media companies, including Entertainment Studios. Instead, Comcast devised a strategy to shut out African American–owned media companies and, in the process, bamboozled President Obama and the federal government in the process.

4. To that end, Comcast entered into a phony memorandum of understanding ("MOU") with non-media civil rights groups, which it submitted to the FCC in order to secure approval of its 2011 acquisition of NBC-Universal. But as set forth herein, the MOU actually did nothing to promote the inclusion of truly African American–owned media companies in the media industry. Quite the opposite, Comcast has used the MOU against Entertainment Studios to perpetuate

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its racial discrimination in contracting for channel carriage.

5. After filing this lawsuit, Plaintiffs learned that they are not alone—Comcast's racial discrimination has affected a number of other African American–owned networks and channels.

6. For example, Comcast's discriminatory contracting practices led to the demise of Black Family Channel, a network that was created by renowned African American attorney Willie E. Gary and other prominent African Americans, including baseball legend Cecil Fielder, former heavyweight boxing champion Evander Holyfield, Marlon Jackson of Jackson Five fame, and television executive Alvin James.

7. And after stringing along another 100% African American–owned channel—Historically Black Colleges and Universities Network ("HBCU Network")—Comcast pulled the plug on the carriage deal they had been negotiating before the Comcast/NBC-Universal merger was approved in 2011. Comcast told HBCU Network that it could obtain carriage on Comcast's television distribution system only via the "MOU Process"—an inherently unequal and discriminatory track for minority-owned networks. Other examples of Comcast's racial discrimination in contracting for carriage abound and will be brought forth in discovery in this action.

8. Comcast and Time Warner Cable collectively spend approximately $25 billion annually for the licensing of pay-television channels and advertising of their products and services ($20 billion licensing and $5 billion advertising), yet 100% African American–owned media companies receive less than $3 million from these companies per year. This discrepancy is the result of—and evidences—racial discrimination in contracting, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

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PARTIES, JURISDICTION AND VENUE

A. Plaintiffs

9. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

10. NAAAOM was created and is working to obtain for African American–owned media the same contracting opportunities as their white counterparts for distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of truly African American–owned media in contracting, the same as white-owned media. NAAAOM currently has six members and, possibly, more in the offing.

11. Historically, because of the lack of distribution/advertising support and economic exclusion, African American–owned media has been forced either to (i) give away significant equity in their enterprises, (ii) pay exorbitant sums for carriage, effectively bankrupting the business, or (iii) go out of business altogether, pushing African American–owned media to the edge of extinction.

12. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its own right. The interests at stake in this litigation—namely, the right of African American–owned media companies to make and enforce contracts in the same manner as their white-owned counterparts—are germane to NAAAOM's purpose. Because NAAAOM seeks only injunctive relief, the individual participation of its members is not required.

13. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American–owned television production and distribution company. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States.

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14. Entertainment Studios is certified as a bona fide Minority Business Enterprise as defined by the National Minority Supplier Development Council, Inc. and as adopted by the Southern California Minority Supplier Development Council.

15. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor/comedian/media entrepreneur. Allen is the sole owner of Entertainment Studios. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his career "on-screen," Allen developed a keen understanding of the "behind the scenes" television business, and over the past 22+ years he has built Entertainment Studios as an independent media company.

16. Entertainment Studios has carriage contracts with more than 40 television distributors nationwide, including VerizonFIOS, Suddenlink, RCN and CenturyLink. These television distributors broadcast Entertainment Studios' networks to their combined 7.5 million subscribers.

17. Entertainment Studios owns and operates seven, high definition television networks (channels), six of which were launched to the public in 2009 and one in 2012. Entertainment Studios produces, owns, and distributes over 32 television series on broadcast television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and won, the Emmy award. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

18. In December 2012, Entertainment Studios launched "Justice Central," a 24-hour, high definition court/informational channel featuring several Emmy-nominated and Emmy-award winning legal/court shows. After just two years, Justice Central has already proved itself a successful channel. Justice Central has

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boasted tremendous ratings growth across key television viewing periods and demographics.

B. Defendants

19. Comcast Corporation is a Pennsylvania corporation, with its principal place of business in Philadelphia, Pennsylvania. Comcast also has an office, is registered to do business and operates in Los Angeles, California. Comcast is a global media giant. It owns NBC Television, Universal Pictures, Universal Studios, multiple (approximately 30) pay television channels (*e.g.*, USA Network, Bravo Network, E! Network, etc.), and it is one of the largest cable companies and internet service providers in the United States. Comcast provides subscription television services to approximately 22 million subscribers—more than any other cable television distributor in the United States. It has near-monopolistic control over the cable market in several major geographic markets across the United States.

20. Time Warner Cable, Inc. is a Delaware corporation, with its principal place of business in New York, New York. Time Warner Cable also has an office, is registered to do business and operates in Los Angeles, California.

21. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

C. Jurisdiction & Venue

22. This case is brought under a federal statute, § 1981 of the Civil Rights Act; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because Defendants reside in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

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FACTS

A. Racial Discrimination in the Media

23. Racial discrimination in contracting is an ongoing practice in the media industry with far-reaching adverse consequences. It effectively excludes African American–owned media companies and African American individuals, and their diverse viewpoints, from the public airwaves.

24. Major television channel distributors, like Comcast and Time Warner Cable, have unique power to limit the viewpoints available in the public media. Channel owners, like Entertainment Studios, are reliant upon the services of television distributors, like Comcast and Time Warner Cable, to provide access to their distribution platform not only to realize subscriber and advertising revenue, but also to reach television consumers themselves.

25. Comcast and Time Warner Cable have control over television distribution on their cable platforms; their exclusion of African American–owned channels has resulted in the near-extinction of 100% African American ownership in mainstream media, and this exclusion is self-perpetuating.

26. There is a statistic that highlights the inequity here: Comcast's Chairman, Brian L. Roberts, was paid $32.9 million in compensation in 2014 alone—ten times more than all of Comcast paid to 100% African American–owned media for channel carriage and advertising combined during the same period. Additionally, the CEO of Time Warner Cable during the same period (2014) was paid approximately $34.6 million, again, more than ten times the amount all of Time Warner Cable paid to 100% African American–owned media for channel carriage and advertising.

27. White-owned media in general—and Comcast in particular—has worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media from contracting for channel carriage and advertising. This has been done through, among other things, the use of "token

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fronts" and "window dressing"—African American celebrities posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses.

28. Comcast is a powerful political player in Washington, D.C. and has used its clout and money to obtain regulatory approval for its acquisitions and sweep its racist practices under the rug. Comcast's chief lobbyist and executive vice president, David Cohen, is a major political fundraiser and the mastermind behind Comcast's conflicts of interest and wrongdoing recounted herein.

29. Comcast influenced and secured favorable votes from government regulators—including Federal Communications Commission ("FCC") commissioner Meredith Attwell Baker—for approval of the Comcast/NBC-Universal transaction; and then hired Baker as an executive shortly after she cast her vote and approved the deal. Comcast rewarded this government regulator with an executive position and a substantially higher salary after she used her power at the FCC to Comcast's benefit. This executive position and compensation package would not have been granted by Comcast had Ms. Baker voted against the merger.

B. Comcast Enters into Sham Memoranda of Understanding with Non-Media Civil Rights Groups

30. In connection with its 2010 bid to acquire NBC-Universal, Comcast was criticized for its refusal to do business with independent and minority-owned media companies, including African American–owned media companies. The Comcast/NBC-Universal merger was subject to regulatory approval by the FCC and the Department of Justice.

31. Entertainment Studios and other minority-owned media companies opposed the merger, publicly criticizing Comcast for its failure to do business with African American–owned media companies. Entertainment Studios urged the FCC to impose merger conditions that would address Comcast's discriminatory practices in contracting for channel carriage.

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32. When Comcast's racist practices and policies jeopardized the approval of the NBC-Universal acquisition, Comcast manipulated ways to secure merger approval while perpetuating its exclusion of African American–owned channels. In order to gain approval of its acquisition of NBC-Universal, Comcast gave millions in monetary "contributions" to various non-media minority special interest groups in order to "buy" support for its expansion.

33. Comcast "donated" funds to at least 54 different groups that went on publicly to endorse the Comcast/NBC-Universal deal. And after buying their support, Comcast entered into what it termed "voluntary diversity agreements," *i.e.*, memoranda of understanding ("MOUs"), with non-media civil rights groups, including NAACP, National Urban League and Al Sharpton's National Action Network. These non-media civil rights groups are not television channel owners and do not operate in the television channel business. They do not produce original television programming, or operate television channels, unlike Entertainment Studios, which does both.

34. Through the MOUs, Comcast purported to address the widespread concerns regarding the lack of diversity in channel ownership on its systems by, among other things, committing to launch several new networks with minority ownership and establishing "external Diversity Advisory Councils" to advise Comcast as to its "diversity practices," including in contracting for carriage. The MOUs were a smokescreen designed to secure merger approval without obligating Comcast to do business with truly African American–owned media companies.

35. Each of the signatories to the MOU between Comcast and the "African American Leadership Organizations" were paid by Comcast in the time leading up to the Comcast/NBC-Universal deal. Comcast paid $30,000 to the NAACP, $835,000 to the National Urban League, and $140,000 to Al Sharpton's National Action Network. Comcast also paid hundreds of thousands of dollars to the National Urban League's various regional affiliates.

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36. Comcast has also paid Reverend Al Sharpton and Sharpton's National Action Network over $3.8 million in "donations" and as salary for the on-screen television hosting position on MSNBC that Comcast awarded Sharpton in exchange for his signature on the MOU. Despite the notoriously low ratings that Sharpton's show generates, Comcast allows Sharpton to maintain his hosting position for more than three years in exchange for Sharpton's continued public support for Comcast on issues of diversity.

37. Comcast paid Sharpton so that he would publicly endorse the NBC-Universal deal and divert attention away from Comcast's racial discrimination in contracting. In exchange, Sharpton's National Action Network and other non-media minority interest groups supported Comcast before the FCC with very little understanding about the merger or expertise in the media business.

38. The MOUs were given the appearance of legitimacy because they were approved by minority interest groups—NAACP, National Urban League, and Al Sharpton's National Action Network, none of which own or operate any television channels, and all of which accepted large donations/pay-offs for their signatures.

39. Ironically, as reported in *The New York Times*, Comcast spent millions of dollars to pay non-media civil rights groups to support its acquisition of NBC-Universal, while at the same time refusing to do business with African American–owned media companies. These payments were a ruse made with an ulterior motive: To make Comcast look like a good corporate citizen while it steadfastly refused to contract with African American–owned media companies.

40. The MOU was signed by Comcast's then–Executive Vice President and Chief Diversity Officer David Cohen. Mr. Cohen was integral in structuring and getting the Comcast / NBC-Universal merger approved, including by acting as one of the main architects of the (phony) MOU. On information and belief, Mr. Cohen also oversees and signs off on the Annual Compliance Reports that Comcast submits to the FCC, in which Comcast misleadingly claims to be doing business with

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African American owned-and-operated channels when, in fact, the channels Comcast has launched pursuant to the MOU are owned, controlled and backed by white-owned media and money.

41. The "Diversity Advisory Councils" Comcast established are also shams. Not only do the Council members have limited understanding of the cable industry and little-to-no experience operating cable networks, but Comcast has not given the Council any real authority to "advise" Comcast as to its diversity initiatives in contracting for carriage. Instead, Comcast gave the Council a standard tour of its offices, and never even asked its members about channel carriage.

C. Comcast Uses the MOU to Discriminate Against Media Companies with Truly "Majority or Substantial" African American Ownership

42. In light of the concerns about Comcast's failure to do business with independent, minority-owned media companies, Comcast had a problem. The sham MOUs solved it: Through the MOUs, Comcast purportedly agreed to enter into carriage agreements with minority-owned media companies; but the channels that were ultimately launched were fronts and were not truly minority-owned.

43. Through the MOU with the African American non-media civil rights organizations, Comcast purportedly agreed to enter into carriage agreements to distribute programming networks in which African Americans have "**majority or substantial**" ownership interest and to add these networks on commercially comparable and competitive terms.

44. But Comcast has done just the opposite. Comcast has used the MOU to facilitate its racist practices and policies in contracting—or, more accurately, refusing to contract—with media companies with truly "majority or substantial" African American ownership. It has not contracted with majority or substantially owned African American media. The MOU is a sham.

45. With the MOU in hand, Comcast proceeded to segregate media businesses with "majority or substantial" African American ownership by creating

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two separate paths for contracting for channel carriage: one for non-minority-owned channels and a separate, but not equal, process for African American–owned channels (the "MOU Process").

46. The MOU Process is distinctly unequal from Comcast's normal process for contracting for carriage. Comcast limits the number of carriage agreements it will enter into through the MOU Process and offers inferior contracting terms. The MOU thus furthers Comcast's discriminatory practices against African American–owned channels. Comcast has used the MOU to create a segregated and unequal path for African American–owned channels to contract for carriage.

47. By relegating companies with "majority or substantial" African American ownership to the MOU Process, Comcast affords them inferior or no contracting opportunities. By contrast, media companies without "majority or substantial" African American ownership are able to contract with Comcast for carriage at any time via Comcast's normal process for contracting for carriage.

48. Comcast refuses to contract with African American–owned media companies—such as Entertainment Studios—through its normal contracting process. African American–owned channels are thus being denied the same opportunity to contract with Comcast as channels without majority or substantial African American ownership. The MOU Process constitutes intentional discrimination.

49. In addition to these racial restrictions, African American–owned media companies face further inequities in the terms and conditions Comcast offers to the channels it chooses through the MOU Process. Comcast has offered shorter-term deals and little, if any, in licensing fees to the channels it launches through the MOU Process. These less favorable contracting terms make it difficult—if not impossible—for the channels launched through the MOU Process to succeed.

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D. In Violation of the MOU, Comcast Has Not Launched Any Independent Networks with "Majority or Substantial" African American Ownership

50. The "diversity" commitments Comcast made through the MOU are fraudulent. The MOU was purportedly intended to result in the launch of so-called "minority-owned" networks—*i.e.*, networks "in which African Americans have a **majority or substantial** ownership interest." In reality, the networks Comcast has launched pursuant to the MOU are owned, controlled, and backed by white-owned media and money. Comcast has given African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting.

51. For example, one of the supposedly "Black channels" Comcast launched—*REVOLT*—is actually owned by Highbridge Capital, which is run by a former Comcast executive who reported directly to David Cohen, Payne Brown. Highbridge Capital is also a subsidiary of JP Morgan, whose Board of Directors includes Comcast's President and COO, Steve Burke. The other supposed "Black channel" Comcast launched—*Aspire*—is actually owned by Intermedia Partners, which is owned/controlled by white businessman Leo Hindery, a long-time friend of Comcast's CEO, Brian Roberts.

52. Although Comcast touts *REVOLT* and *Aspire* as satisfying its MOU commitments, neither is a network with truly "**majority or substantial**" African American ownership. These networks give African American celebrities token ownership interests but, in reality, are owned and operated by Comcast insiders.

53. The only channel with "majority or substantial" African American ownership that Comcast has launched—*The Africa Channel*—is owned and operated by a Comcast insider, Paula Madison. Madison is a former Comcast/NBC-Universal executive and oversaw the execution of the MOU.

54. In other words, aside from a channel that is owned and operated by the former Comcast/NBC-Universal executive who co-authored the MOU, Comcast has

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not launched a single channel with majority or substantial African American ownership—by way of the MOU or otherwise.

55. Comcast made similar "diversity commitments" to the Hispanic community in order to secure approval of its bid to acquire NBC-Universal. But again, rather than launching any truly Hispanic-owned channels, Comcast launched "Baby First Americas"—a non-Hispanic-owned channel (the channel's founders, owners and operators are Guy Oranim and his wife, Sharon Rechter, who are Israeli). Bill Burke—brother of Comcast's President and COO, Steve Burke—is on the Board of Directors of Baby First Americas.

E. Comcast and Time Warner Cable Refuse to Contract with Entertainment Studios on the Basis of Race

56. Entertainment Studios, a 100% African American–owned media company, has been shut out from doing business with Comcast despite significant efforts to do so. Like many other African American–owned channels that have tried to secure cable carriage during Comcast's 50+ year history, Entertainment Studios has had multiple meetings for channel carriage with Comcast but, like the others, to no avail. Comcast has discriminated against Entertainment Studios at every turn.

57. Entertainment Studios has been trying for several years to contract with Comcast for carriage of one or more of Entertainment Studios' seven channels. Comcast has refused and strung Entertainment Studios along. Comcast has given Entertainment Studios the false impression that its channels are on Comcast's "short list" and provides a variety of different excuses for its refusal to carry any of Entertainment Studios' channels, even though the channels are widely viewed on Comcast's competitors' television distribution systems.

58. Comcast has been playing a game of "whack-a-mole" with Entertainment Studios—each time Entertainment Studios jumps a pretextual hurdle created by Comcast (*e.g.*, Comcast executive, Jennifer Gaiski, required Entertainment Studios to present empirical data and secure support "in the field" so

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that she could present such material to Comcast senior management, Greg Rigdon and Neil Smit), Comcast replaces it with a new obstacle. Although Entertainment Studios has complied with each of Comcast's demands, Comcast still refuses to launch any of Entertainment Studios' channels.

59. For example, Comcast Corporate directed Entertainment Studios to garner support from Comcast's Division offices in order to bolster its carriage request. But when Entertainment Studios reached out to the different Divisions (Northeast, Central and West), the Divisions indicated that they "deferred to Corporate."

60. Comcast Corporate also emphasized the need for feedback from the Regions. But again, when Entertainment Studios received support from key Comcast Regions (*e.g.*, Chicago, Southwest), Comcast Corporate nevertheless denied carriage. In some cases, Entertainment Studios was inconsistently advised *not* to meet with the Regions because all carriage decisions were funneled through Comcast Corporate. Comcast required Entertainment Studios to run around in circles—and spend hundreds of thousands of dollars on travel and expenses—without any intention of considering a carriage deal.

61. Comcast has used other phony excuses to justify its racial discrimination. For example, it claims that it does not have the bandwidth to accommodate Entertainment Studios' channels or that it is not a buyer of new channels. But meanwhile, Comcast has entered into carriage agreements with other non-minority-owned channels, belying its various pretextual excuses.

62. Comcast also claims that it is interested in adding carriage only for news and sports channels. This is yet another phony excuse. Comcast has added other, non-news, non-sports channels while simultaneously refusing to contract with Entertainment Studios and turning down another 100% African American–owned channel focused on black college sports, HBCU Network.

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63. Comcast further claims that there is no demand for Entertainment Studios' channels, but that, too, is belied by the facts: Entertainment Studios' channels have a proven track record of high ratings and popularity among viewers and are distributed by other national television providers. Entertainment Studios' programming has garnered Emmy nominations and wins. Entertainment Studios sells its channels to dozens of other programming distributors and television stations, which distribute Entertainment Studios' channels to millions of subscribers.

64. For example, one of Entertainment Studios' most recently launched channels, Justice Central, has achieved success in the short time it has been on the air. Justice Central's double- to triple-digit ratings growth outperformed the vast majority of networks that Comcast and Time Warner Cable pay substantial license fees to carry. Indeed, between the first quarter of 2013 and the fourth quarter of 2014, Justice Central boasted huge ratings growth on AT&T's television platform, as follows:

Justice Central – AT&T U-Verse Ratings Growth

Daypart:	Air Time:	% Growth 1st Qtr. 2013 to 4th Qtr. 2014:
Early Fringe	4-7pm	+38%
Prime Access	7-8pm	+21%
Prime	8-11pm	+53%
Late Fringe	11pm-2am	+552%
Overnight	2-6am	+295%

65. Entertainment Studios even offered for Comcast to launch Justice Central *for free*, but Comcast still insisted that Entertainment Studios proceed via the MOU Process in its attempts to obtain carriage. This is evidence that Comcast's decision is based on racial animus and retaliation for Entertainment Studios' opposition to the Comcast/NBC-Universal merger, rather than legitimate business considerations.

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66. Entertainment Studios did not know that Comcast was using the MOU as a vehicle to perpetuate racial discrimination in contracting until recently. In November 2014, Entertainment Studios first discovered that Comcast had set up dual paths for negotiating for carriage (one for non-minority-owned media and one for African American–owned media) when it was told by Comcast that it would be relegated to the MOU Process. These two paths for carriage are separate, but not equal—the very definition of discrimination.

67. Comcast has admitted that it is "impressed" by Entertainment Studios' programming and channels, but has excluded Entertainment Studios from obtaining carriage through Comcast's normal contracting process. Instead, Comcast has forced this 100% African American–owned media company to apply for carriage through the "MOU Process."

68. For example, in November 2014, a Comcast executive told Entertainment Studios that although its channels were good enough for carriage on Comcast's platform, Entertainment Studios would have to wait to be part of the "next round of [MOU] considerations."

69. In other words, Comcast told Entertainment Studios that it would consider contracting to carry Entertainment Studios' channels only to the extent that the carriage agreement would satisfy Comcast's obligation to launch networks with "majority or substantial" African American ownership pursuant to the MOU. But as described above, the MOU Process has never resulted in the launch of channels with truly "majority or substantial" African American ownership.

70. Comcast has, in essence, created a "Jim Crow" process with respect to licensing channels from media companies with "majority or substantial" African American ownership. Comcast has reserved a few spaces for African American–owned media companies in the "back of the bus," while the rest of the bus is occupied by non-African-American-owned media companies. This is racial discrimination in contracting.

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71. Entertainment Studios is restricted to applying for carriage with Comcast via the MOU Process not because of the nature of its channels—which are broad market with global appeal—but because it is African American–owned. For racial reasons alone, Entertainment Studios is forced to participate in a discriminatory process. This is racial discrimination in contracting, in violation of 42 U.S.C. § 1981.

72. The MOU enables Comcast to tout a phony, non-existent "commitment" to racial diversity. All the MOU has done is allow Comcast to "legitimize" its racist policies and practices so it can continue to refuse to do business with African American–owned media companies.

73. According to Comcast, Entertainment Studios must go through the MOU Process for obtaining channel carriage. This prevents Entertainment Studios from being treated equally with its non-minority-owned/controlled counterparts.

74. These are violations of § 1981: Comcast's refusal to contract with media companies with majority or substantial African American ownership; its implementation of dual paths for carriage (*i.e.*, one path for non-minority-owned media and a separate "MOU Process" for African American–owned media companies); its discrimination in the contractual terms it offers to African American–owned media companies; and its pretextual excuses for refusing to contract.

75. Comcast's discriminatory intent is further evidenced by the fact that of the approximately $10 billion in content fees that Comcast pays to license channels and advertise each year, less than $3 million is paid to 100% African American–owned media. The payments Comcast makes to African American–owned media companies are tokens and a charade. Comcast pays minimal amounts to license and distribute the Africa Channel, which is owned and operated by a former Comcast/NBC-Universal executive/insider, Paula Madison, one of the architects of the MOU Comcast uses to perpetuate its racial discrimination in contracting.

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76. Time Warner Cable likewise refuses to contract with Entertainment Studios on the basis of race. Outside of a single channel (Africa Channel) that is owned and operated by the former Comcast executive, Time Warner Cable does not distribute any channels that are owned and operated by 100 % African American–owned media companies either.

77. In the time leading up to the then-pending merger between Comcast and Time Warner Cable, Entertainment Studios had made progress negotiating the terms of a possible carriage deal with Time Warner Cable. But then Comcast programming executive, Jennifer Gaiski, asked who Entertainment Studios was in discussions with at Time Warner Cable about launching its channels.

78. Entertainment Studios disclosed that it had advanced negotiations with Time Warner Cable executive, Melinda Witmer (who was presenting Entertainment Studios' information to Time Warner Cable President and COO, Robert Marcus). Soon thereafter, Entertainment Studios' channel launch opportunity was shut down by Time Warner Cable under orders from Comcast.

79. Thus, in the face of the then-pending pending merger between Comcast and Time Warner Cable, Time Warner Cable delegated channel carriage decision-making to Comcast—"gun jumping" the consummation of the Comcast / Time Warner Cable merger in violation of federal law. Time Warner Cable thus adopted Comcast's racist policies and practices in connection with refusing to contract with Entertainment Studios.

80. Entertainment Studios is being discriminated against on account of race in connection with contracting in violation of the Civil Rights Act. Without access to viewers and without licensing fees and advertising revenues from the largest video programming distributors in the country, this 100% African American–owned media business is being shut out and severely damaged, like all other truly African American–owned media networks.

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F. Comcast's History of Racial Discrimination Against African American–Owned Media Companies

81. Comcast's discrimination against Entertainment Studios, as detailed herein, is part and parcel of a pattern of racial discrimination this media giant has perpetrated for decades. Indeed, Comcast cannot identify a single independent 100% African American–owned network that it has distributed on its television platform in its 50+ years of operation. As set forth below, Comcast has historically discriminated against African American–owned media companies in contracting for channel carriage in favor of media companies that are owned and operated by white Comcast cronies.

Black Family Channel

82. Entertainment Studios is not the first African American–owned media company to contemplate legal action against Comcast for its blatant racial discrimination in contracting. Another is MBC Network (later known as Black Family Channel), which threatened to sue Comcast for its racial discrimination in contracting—even going so far as to draft a lawsuit alleging violations of 42 U.S.C. § 1981, the same claim asserted herein.

83. Black Family Channel was founded by renowned African American attorney Willie E. Gary and other prominent African American entrepreneurs, including baseball legend Cecil Fielder, former heavyweight boxing champion Evander Holyfield, Marlon Jackson of Jackson Five fame, and television executive Alvin James.

84. From its launch in 1999 until 2002, the Black Family Channel was distributed to millions of viewers on Comcast's television system. Beginning in 2002, however, Comcast informed Black Family Channel that to guarantee continued carriage on Comcast's systems, Black Family Channel would need to give Comcast a significant ownership interest in the company.

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85. When Black Family Channel refused, Comcast began retaliating and discriminating against this 100% African American–owned media company. Comcast halted the expansion of Black Family Channel in new markets; placed Black Family Channel on a more expensive, less-penetrated, less-favorable program tier; and gave Black Family Channel inferior channel positioning. Comcast additionally withdrew advertising opportunities from Black Family Channel, eliminating an important revenue source for the network.

86. Comcast deliberately discriminated against Black Family Channel in contracting for carriage on the basis of race. Indeed, Comcast did not require similarly situated, white-owned networks to give Comcast an ownership interest in their networks in order to secure carriage on favorable, non-discriminatory terms.

87. As a result of Comcast's discrimination, Black Family Channel was denied increased carriage and licensing fees, leading to the network's demise. The network was eventually sold to Gospel Music Channel, a network that was financially backed and controlled by white businessman Leo Hindery. (Due to Comcast's discrimination and concomitant limited distribution of Black Family Channel, the network was undervalued and sold for less than $10 million.)

88. After Black Family Channel was taken over by a white businessman, Comcast rolled out the red carpet for the network: Comcast agreed to enter into a carriage agreement with Gospel Music Channel and to broadly distribute the network on its cable platform. Today, Leo Hindery is undertaking efforts to sell the network (now called Up TV) for approximately $550 million—in other words, Black Family Channel's value has increased more than 50-fold by virtue of Comcast's newfound willingness to do business with the network now that it is white-owned.

HBCU Network

89. Comcast also discriminated on the basis of race in its dealings with Historically Black Colleges and Universities ("HBCU") Network, another African

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American–owned network. HBCU Network is a sports, entertainment and lifestyle network devoted to historically black colleges and universities. It was created by two African American media entrepreneurs, Curtis Symonds and Clint Evans. Mr. Symonds is a cable industry veteran—he was an executive at ESPN for eight years and served as Executive Vice President, Distribution and Marketing for BET Networks for more than 14 years. HBCU Network pledged to give back to the black colleges and universities by partnering with them and sharing in the network's ownership and profits.

90. Mr. Symonds has detailed Comcast's discriminatory dealings with HBCU Network in writing, as follows: HBCU Network met with Comcast's then–Senior Vice President of Programming, Madison Bond, and his executive team to negotiate a carriage agreement. Comcast told Mr. Symonds that it was excited about the network and, soon after the meeting, Comcast offered HBCU Network a 20-year carriage deal, including license fees.

91. As HBCU Network was moving forward to finalize the terms of its carriage deal, Comcast pulled the rug out from under the network: Comcast told HBCU Network that in light of the merger between Comcast and NBC-Universal, Comcast was required to launch a certain number of minority-owned networks and even though HBCU Network had been at a very advanced stage of negotiations for carriage, it would need to start over and proceed via the application process for minority-owned networks (*i.e.*, the "MOU Process" described herein).

92. In other words, because—and only because—HBCU Network was an African American–owned network, it was forced to proceed via the MOU Process rather than finalizing the carriage deal that had already been underway through Comcast's normal contracting process.

93. Instead of launching HBCU Network via the MOU Process, Comcast turned them away completely. After Comcast had (purportedly) satisfied its MOU commitment, it was unwilling to do business with this 100% African American–

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owned network.

Soul Train

94. "Soul Train" is an iconic African American–owned television series created by the late Don Cornelius, a successful African American television producer. Like Black Family Channel and HBCU Network, Comcast also refused to do business with Don Cornelius Productions, a 100% African American–owned media company that wanted to launch a Soul Train network. Comcast shut them out, forcing them to sell the Soul Train franchise to the same white businessman, Leo Hindery, who bought the Black Family Channel at a steep, below-market discount.

FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS (42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Comcast & Time Warner Cable

A. Section 1981

95. NAAAOM refers to and incorporates by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

96. Comcast and Time Warner Cable have engaged in, and are engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under § 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

97. African Americans are a protected class under Section 1981. Entertainment Studios is a 100% African American–owned media business.

98. As alleged herein, Entertainment Studios attempted many times over many years to contract with Comcast and Time Warner Cable to carry its channels, but these television distributors have refused, providing a series of phony, pretextual excuses. Yet Comcast and Time Warner Cable have continued to contract with—and make themselves available to contract with—similarly situated white-owned

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television channels.

99. Comcast has refused to contract with Entertainment Studios for channel carriage and advertising. Entertainment Studios has been deprived of the right to contract with Comcast by being relegated to the MOU Process, while non-minority-owned businesses have been afforded the right to contract with Comcast through its normal, more accessible process.

100. Comcast has dealt with Entertainment Studios and other African American–owned media companies in a markedly hostile manner and in a manner which a reasonable person would find discriminatory. Comcast has a pattern and practice of refusing to do business with, or offering unequal contracting terms to, African American–owned media companies.

101. Time Warner Cable has likewise refused to contract with Entertainment Studios for channel carriage and advertising. In the face of the then-pending merger between Comcast and Time Warner Cable, Time Warner Cable delegated channel carriage decision-making authority to Comcast. Accordingly, Time Warner Cable engaged in the same discriminatory conduct as Comcast. Time Warner Cable adopted Comcast's racist policies and practices in connection with contracting for channel carriage. After Comcast demanded to know who Entertainment Studios was talking to at Time Warner Cable to get channel carriage, Time Warner Cable closed the door (at the instruction of Comcast) on negotiations and shut out Entertainment Studios.

B. <u>Damages</u>

102. But for Comcast's and Time Warner Cable's refusal to contract with Entertainment Studios, Entertainment Studios would receive approximately $378 million in annual license fees for its seven channels—calculated using a conservative license fee of fifteen cents per subscriber per month for each channel for Comcast / Time Warner Cable's combined 30 million subscribers. If Defendants contracted in good faith, Entertainment Studios would also receive an estimated

$200 million per year, per channel, in national advertising sales revenue, or a total of $1.4 billion per year, equaling a combined total of $1.8 billion in annual revenue.

103. Combining subscriber fees and advertising revenue, Entertainment Studios would generate approximately $1.8 billion in annual revenue from its carriage and advertising contracts with Comcast / Time Warner Cable. Moreover, with distribution on two of the largest television platforms in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' channels.

104. Based on the revenue Entertainment Studios would generate if Defendants contracted with them in good faith, Entertainment Studios would be valued at approximately $20 billion.

105. Similarly situated lifestyle and entertainment media companies are valued at higher amounts. But for Comcast's and Time Warner Cable's refusal to contract with Entertainment Studios, Entertainment Studios would have a similar valuation.

106. Accordingly, Comcast's and Time Warner Cable's unlawful discrimination has caused Entertainment Studios in excess of $20 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages in excess of $20 billion according to proof at trial;

2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Comcast and Time Warner Cable from discriminating against African American–owned media companies, including

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Entertainment Studios, based on race in connection with contracting for carriage and advertising;

3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Defendants' net worth;

4. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and

5. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: September 21, 2015

Respectfully Submitted,

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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury pursuant to the Seventh Amendment of the United States Constitution.

DATED: September 21, 2015 MILLER BARONDESS, LLP

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COMCAST CORPORATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation,

Plaintiffs,

v.

COMCAST CORPORATION, a Pennsylvania corporation; TIME WARNER CABLE INC., a Delaware corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:15-cv-01239-TJH-MAN

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT BY DEFENDANT COMCAST CORPORATION

Judge: Hon. Terry J. Hatter, Jr.
Hearing Date: December 28, 2015
Time: UNDER SUBMISSION
Courtroom: 17

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INTRODUCTION

The First Amended Complaint filed by Plaintiffs Entertainment Studios Networks, Inc. ("ESN") and the National Association of African-American Owned Media ("NAAAOM") is virtually identical to the one that this Court already dismissed: it "fails to allege any plausible claim for relief." Dkt. 42 at 3. Rather than addressing the concerns raised by this Court and alleging *facts* to support their claim of race discrimination and demand for *twenty billion* dollars in damages, Plaintiffs continue to peddle the offensive and utterly implausible theory that Comcast conspired with respected civil rights organizations and federal officials to systematically discriminate against African Americans. FAC ¶¶ 28−39. Plaintiffs still allege no facts to support their allegations of a vast conspiracy. Instead they have doubled-down on ludicrous slander, and now boldly claim without any factual support that "Comcast devised a strategy to shut out African American–owned media companies" that has somehow "bamboozled President Obama and the federal government." FAC ¶ 3. Because Plaintiffs have failed to allege facts sufficient to state any plausible claim, this action should again be dismissed—this time with prejudice.

The facts that Plaintiffs *do* allege continue to tell the same story: ESN proposed its channels for carriage to Comcast, Comcast considered ESN and gave advice on how ESN could improve its proposal, but ultimately declined to carry ESN's channels, citing concerns over bandwidth and low demand for ESN's content. FAC ¶¶ 56–63. Thus, the FAC itself contains factual allegations that supply an obvious, non-discriminatory reason for Comcast's decision to decline carriage that has nothing to do with race. That is, Comcast did not believe that ESN's content was a good enough value for Comcast and its subscribers to justify the use of Comcast's limited video bandwidth to carry its channels—which is precisely the same judgment that Comcast makes every year to reject hundreds of other carriage applicants (owned by persons of all different races). *See, e.g.*, *In re Herring Broad., Inc.*, 24 F.C.C. Rcd. 12967, 12991 (2009) (noting that Comcast's practice is "to carry unaffiliated networks *if such*

carriages further Comcast's business interests") (emphasis added). The fact that there is an "'obvious alternative explanation'" for Comcast's supposedly wrongful conduct—namely, that Comcast denied ESN carriage for legitimate business reasons—is fatal to the Plaintiffs' latest complaint, because Plaintiffs have alleged no "facts tending to exclude the possibility that the alternative explanation is true." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996–97 (9th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009)).

Plaintiffs' other concessions make their claims of intentional race discrimination all the more implausible. Plaintiffs expressly *admit* that Comcast *does* contract with African American content providers, including the 100% African American owned Africa Channel. *See* FAC ¶¶ 53, 75–76. Plaintiffs provide no legitimate reason to ignore Comcast's carriage of the Africa Channel. Instead, they attack the other African American content providers that have been added by Comcast as part of its voluntary commitment to increase diverse programming under Comcast's Memorandum of Understanding ("MOU") with leading civil rights organizations. The attack is a peculiar one: that those African American companies are not "100% African American owned" and thus do not meet Plaintiffs' idiosyncratic notions of racial identity. *See* FAC ¶¶ 50−52. But Plaintiffs still allege no *facts* that would plausibly explain why Comcast would welcome business partners owned or controlled substantially by African Americans (and focused on African American programming), but not "100%" by African Americans, if its carriage decisions were based on race rather than legitimate business concerns.

Against this backdrop, the few new allegations alleged in Plaintiffs' FAC do not make their underlying theory any more plausible. They allege, for example, that over the course of "decades," FAC ¶ 81, some channels owned by African Americans were denied carriage or received terms from Comcast that (Plaintiffs assert) were commercially unfavorable, FAC ¶¶ 81–94. But Plaintiffs' conclusory allegations do nothing to plausibly demonstrate that Comcast's treatment of those channels was based

on race, rather than bona fide business considerations. Indeed, there is not a single fact alleged in the FAC that would plausibly establish that these channels were treated poorly in comparison to similarly situated channels owned by persons of other races. The remainder of Plaintiffs' new allegations consist of a handful of non-material details regarding ESN's negotiations with Comcast, and an expansion of their baseless attack on Comcast's efforts to promote diversity through the MOU.

In short, the FAC confirms that this case is nothing more than a publicity stunt. Plaintiffs have not come to court to pursue legitimate violations of the civil rights laws. Rather, Plaintiffs are using this Court's docket as a vehicle for ESN's owner, Byron Allen, to spew rhetoric against President Obama, respected civil rights organizations, and Allen's other perceived enemies. The Court has already given Plaintiffs a chance to salvage their suit by coming forth with facts sufficient to state a plausible claim. Their completely inadequate amendment confirms that Plaintiffs cannot allege any facts that could render their outlandish claims plausible. Further amendment would be futile, and this Court should dismiss this action with prejudice.

SUMMARY OF ALLEGATIONS

As in the original complaint, Plaintiffs allege in the FAC that ESN—which Plaintiffs claim is "the only 100% African American-owned video programming producer and multi-channel operator/owner in the United States," FAC ¶ 2—"had multiple meetings for channel carriage with Comcast," FAC ¶ 56, but that Comcast "refuse[d] to launch [ESN's] channels" solely out of racial animus, FAC ¶ 58. The only additions in the FAC regarding ESN's interactions with Comcast are: (a) allegations of specific steps that Comcast suggested ESN take in order to "bolster its carriage request," FAC ¶¶ 59–60; and (b) the allegation that ESN "offered for Comcast to launch Justice Central *for free*," FAC ¶ 65.

The FAC repeats Plaintiffs' allegation that Comcast entered into a "sham" agreement to promote diversity (the Memorandum of Understanding) with the National Association for the Advancement of Colored People, the National Urban

League, Inc., and the National Action Network. FAC ¶¶ 30–39. Plaintiffs again claim that "Comcast has used the MOU to facilitate its racist policies" by relegating African American owned companies to a "separate, but not equal," process for seeking carriage, FAC ¶¶ 44–49, 66–74, and that Comcast has failed to live up to its diversity commitments under the MOU, FAC ¶¶ 40–41, 50–55.

Plaintiffs also allege that Comcast "has historically discriminated against African American-owned media companies." FAC ¶ 81. Plaintiffs have added to the FAC three purported examples of this supposed discrimination: the Black Family Channel, FAC ¶¶ 82–88, the Historically Black Colleges and Universities Network ("HBCU Network"), FAC ¶¶ 89–93, and the Soul Train Network, FAC ¶ 94.

LEGAL STANDARDS

A complaint must be dismissed under Rule 12(b)(6) unless it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's first task on a motion to dismiss is to separate the complaint's legal conclusions—which do not receive a presumption of truth—from its factual allegations. *Id.* at 678–79.

Once the legal conclusions are set aside, a claim is facially plausible when the facts to support it allow the court to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* at 678. Where there is an "'obvious alternative explanation' for [the] defendant's behavior," the plaintiff has not plausibly alleged a violation of the law. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 682). Thus, as the Court previously explained, to avoid dismissal a complaint must contain factual allegations establishing "more than a possibility that the defendant has acted unlawfully," and "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Dkt. 42 at 3 (citing *Iqbal*, 556 U.S. at 678; *Eclectic Properties*, 751 F.3d at 996).

ARGUMENT

Rather than take seriously this Court's prior ruling that nothing in the original complaint stated a plausible claim for relief, Dkt. 42 at 3, Plaintiffs have virtually cut-and-pasted all of the same allegations into the FAC. In fact, Plaintiffs have recycled wholesale the same threadbare theories that this Court has already rejected, adding only minor, immaterial additions to the allegations that this Court previously found insufficient. And the bulk of the new allegations in the FAC—conclusory allegations of purported discrimination against other companies—fail to establish that Comcast has discriminated against *anyone*, let alone ESN specifically.

Plaintiffs have once again failed to provide a factual basis for their outlandish claims. At this point, it is clear they cannot do so. The Court should dismiss the FAC and not permit Plaintiffs to file another amended complaint.

A. Plaintiffs' Conclusory Allegations About Other Channels Have Nothing To Do With ESN And Do Not Provide Any Support For Plaintiffs' Claims

The primary difference between the FAC and Plaintiffs' original complaint is the addition of a series of conclusory allegations that Comcast discriminated against *other* channels with an African American identity at various, disparate times over "its 50+ years of operation": the Black Family Channel, HBCU Network, and the Soul Train Network. *See* FAC ¶¶ 81–94. But these allegations add nothing to Plaintiffs' still-unsupported claim that Comcast engaged in a vast conspiracy specifically designed to discriminate against ESN. Indeed, there is nothing in the FAC connecting Comcast's alleged interactions with these other companies, which are not parties to this lawsuit, to its carriage negotiations with ESN.

Even accepting as true every factual allegation in these paragraphs—but setting aside the conclusory labels of discrimination and disparate treatment, as *Iqbal* requires, *see* 556 U.S. at 679—there are no *facts* alleged that suggest in any way that Comcast discriminated against *any* of these companies. And from the few facts that Plaintiffs

do allege, the far more plausible inference in each case is that Comcast made legitimate business decisions regarding its channel lineup, as it did with ESN.

Black Family Channel. Plaintiffs allege that Comcast carried the Black Family Channel from "1999 until 2002." FAC ¶ 84. At that point, Comcast allegedly told the channel "that to guarantee continued carriage," it "would need to give Comcast a significant ownership interest in the company," but "did not require similarly situated, white-owned networks" to do likewise. FAC ¶¶ 84, 86. When Black Family Channel supposedly refused, Plaintiffs say that Comcast "began retaliating and discriminating against" the channel by limiting its expansion in new markets, curtailing its "advertising opportunities," and downgrading its "program tier" and "channel positioning"—all resulting in the channel's "demise." FAC ¶¶ 85, 87.

In the first place, it is entirely implausible that Comcast could make such a demand on a small network. Both federal law and FCC regulations provide that a cable operator like Comcast "shall [not] require a financial interest in any program service as a condition for carriage[.]" 47 U.S.C. § 536(a)(1); *see also* 47 C.F.R. § 76.1301(a). If Comcast had made the sort of demand that Plaintiffs allege, then surely the Black Family Channel would have invoked its right to report Comcast to the FCC. *See* 47 C.F.R. § 76.1302. Notably, Plaintiffs do not allege that any such complaint was ever brought.

But even accepting, at this stage, Plaintiffs' allegation that Comcast demanded an ownership interest in exchange for continued carriage, that does not support an inference of intentional *race* discrimination. Plaintiffs' conclusory statement that Comcast treated Black Family Channel differently from "similarly situated, white-owned networks" is entitled to no weight because disparate treatment is a *legal conclusion* that is an element of Plaintiffs' cause of action under 42 U.S.C. § 1981. *See Iqbal*, 556 U.S. at 639. Just like Plaintiffs' allegations about ESN, the FAC pleads nothing about which "white owned" channels supposedly were "similarly situated," and in what respects.

When stripped of Plaintiffs' own self-serving labels, the facts alleged in these paragraphs are obviously explained by the more likely conclusion that Black Family Channel's "demise" was the result of poor performance. In which case, Comcast's alleged actions—limited expansion, downgraded program tier, and so forth—were a perfectly rational business response to the channel's troubles.

HBCU Network. Plaintiffs allege that Comcast was engaged in negotiations over a carriage agreement with HBCU Network and was "moving forward to finalize the terms" of a deal when Comcast "pulled the rug out from under the network," declined carriage and told the Network to "proceed via the MOU Process." FAC ¶¶ 91, 92. Comcast allegedly "turned them away completely" at a future unspecified date. FAC ¶ 93.

Plaintiffs hope to draw the inference that Comcast was willing to consider HBCU Network for carriage, as an African American owned company, *only* to fulfill the diverse programming commitments in the MOU. But this is precisely the same implausible story that Plaintiffs told about ESN, only with a different protagonist and a different metaphor of choice ("pull the rug out" versus "whack-a-mole"). And the story gets no better by changing the names of the participants, because the MOU itself confirms that it is a *leg up* for minority-owned networks that Comcast might not otherwise carry because of bandwidth limitations and undemonstrated or limited demand—not a limitation on carriage. Just as with the already dismissed claim by ESN, Plaintiffs' new allegation is merely that Comcast considered HBCU Network for carriage, but ultimately passed, and then provided HBCU Network with an *additional* opportunity to be considered in light of the MOU, though ultimately did not select it. While Plaintiffs seem determined to smear diversity outreach efforts like the MOU and the companies and civil rights organizations that have made those efforts possible, this Court has already determined that Plaintiffs' perverse and fevered allegations impugning those efforts do not support a plausible inference of discrimination.

Soul Train Network. Finally, Plaintiffs allege that, at an unspecified date, Comcast "refused to do business with Don Cornelius Productions, a 100% African American-owned media company that wanted to launch a Soul Train network." FAC ¶ 94. That is literally everything that Plaintiffs have to say about the putative Soul Train network. They say only that Don Cornelius Productions *wanted* to launch Soul Train network; Plaintiffs never allege that Don Cornelius Productions brought that idea into reality or pitched this channel to Comcast. Plaintiffs disclose no facts about when, why, or how Comcast "refused" to do business with this company—just that, at some point, it happened. Suffice it to say that this fails to allege any conceivably pertinent facts, much less raise a plausible inference of discrimination.

B. The Remainder Of The First Amended Complaint Reiterates The Same Unsupported Theories That This Court Has Already Rejected

Aside from conclusory allegations of discrimination regarding companies not parties to this suit and that have nothing to do with ESN, the FAC presents exactly the same claim as the original complaint: Plaintiffs allege that Comcast conspired with civil rights groups and public officials in order to deny television carriage to ESN on the basis of race, in violation of 42 U.S.C. § 1981. FAC ¶¶ 3, 99. Because Plaintiffs have added no material factual allegations in the FAC to support this claim, they have, once again, failed to plead the requisite facts to state a claim under § 1981.

Section 1981(a) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" The statute "reaches only purposeful discrimination." *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982); *see also Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 536 (9th Cir. 1982). A plaintiff cannot state a claim under § 1981 by merely alleging that the defendant uses a policy that has a disparate racial impact, *General Building Contractors*, 458 U.S. at 390; for example, by drawing inferences from the amount of money that allegedly goes to "100% African American-owned channels,"

FAC ¶ 24. Instead, the plaintiff must plead *facts*—not mere legal conclusions—that are "sufficient to plausibly suggest [the defendants'] discriminatory state of mind." *Iqbal*, 556 U.S. at 683.

Plaintiffs again claim that the multiple reasons Comcast gave for declining to carry ESN's channels were "phony excuses." FAC ¶ 61. Plaintiffs also reprise their allegation that the MOU between Comcast and civil rights organizations, in which Comcast agreed voluntarily to implement certain diversity initiatives, including increased carriage of diverse programming networks, was actually a "smokescreen" that gave Comcast cover to discriminate on the basis of race. FAC ¶ 34. While the MOU on its face explains Comcast's efforts to *increase* opportunities for African Americans by giving African American owned and operated networks increased opportunities for carriage, Plaintiffs again deride Comcast as "relegating" ESN and other African American owned content-providers to a "'Jim Crow' process." FAC ¶ 70. Simply to describe these allegations—which the Court has already considered—is nearly sufficient to demonstrate their implausibility, which is why this Court correctly dismissed Plaintiffs' original complaint for failure to state a plausible claim to relief.

Indeed, Plaintiffs' FAC—like their original complaint—is strikingly similar to the complaint that the Supreme Court rejected in *Iqbal*. Plaintiffs have offered little more than "[t]hreadbare recitals of the elements" of their § 1981 action, "supported by mere conclusory statements" that Comcast denied carriage based on race and gave preferential treatment to similarly situated applicants of other races. *Iqbal*, 556 U.S. at 678. Setting aside Plaintiffs' legal conclusions, the facts alleged do not raise a plausible inference of discrimination because they fail to exclude an "'obvious alternative explanation,'" *id.* at 682 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007))—namely that Comcast exercised its business judgment to determine that ESN's channels lacked sufficient consumer interest to warrant the costs in both dollars and bandwidth that those channels would impose on Comcast.

By reiterating in the FAC the same conclusory assertions, the same twisted reading of the MOU, and the same insufficient factual allegations, Plaintiffs have given the Court more than enough reason to dismiss this case with prejudice. *See Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004) ("Where the plaintiff has previously filed an amended complaint, . . . the district court's discretion to deny leave to amend is 'particularly broad.'") (citation omitted); *Marable v. Nitchman*, 511 F.3d 924, 930 n.11 (9th Cir. 2007) (law of the case doctrine generally bars reconsideration of "issue decided explicitly or by necessary implication . . . in the identical case"); *Rosas v. Carnegie Mortg., LLC*, No. 11-7692, 2013 WL 791024, at *6 (C.D. Cal. Feb. 25, 2013) ("[P]laintiffs simply reassert unmodified allegations . . . . [T]he Court previously found that these same allegations fail to state a claim . . . . [T]he court dismisses these claims with prejudice.").

1. As With Plaintiffs' Original Complaint, Conclusory Assertions of Discrimination Must Be Disregarded

At *Iqbal*'s first step, this Court identifies the "[t]hreadbare recitals of the elements of a cause of action" and "mere conclusory statements" that "are not entitled to the assumption of truth." 556 U.S. at 678–79. Here, Plaintiffs' FAC is once again littered with conclusory statements that cannot be presumed true and that the Court must disregard in assessing whether Plaintiffs have stated a plausible claim.

In particular, the FAC's repeated assertion that "Comcast has discriminated against [ESN]," *e.g.*, FAC ¶ 56, is exactly the sort of conclusory assertion the Supreme Court has held is not entitled to a presumption of truth, *see Iqbal*, 556 U.S. at 680–81. Nor should the Court accept Plaintiffs' unfounded opinion that, because ESN's channels have allegedly "achieved success," Comcast must have declined to purchase them because of race discrimination and for no other reason. FAC ¶ 64; *see Amobi v. Ariz. Bd. of Regents*, No. 10-1561, 2011 WL 308466, at *4 (D. Ariz. Jan. 28, 2011) (dismissing a discrimination case in the analogous Title VII context because the

plaintiff's "allegation that she was and is fully qualified for promotion and tenure is conclusory and not entitled to be assumed true").

Plaintiffs continue to assert, in conclusory fashion, that Comcast treats 100% African American owned companies differently from "similarly situated white-owned television channels." *E.g.*, FAC ¶ 98; *see also* FAC ¶¶ 61, 62. But leaving aside whether 100% African American owned companies are even a specifically protected class distinct from African American owned companies generally, Plaintiffs continue to provide no factual allegations regarding how, exactly, Comcast discriminates against this class, such as by identifying any of the supposedly similarly situated non-diverse channels or their supposedly preferable treatment. Nor do Plaintiffs provide any factual allegations that would establish that these unidentified channels are actually similarly situated to ESN in any relevant respect, such as in the nature of programming, target audience, ratings and consumer interest, or the "look and feel" of the network. *See Herring Broad., Inc. v. FCC*, 515 F. App'x 655, 656–57 (9th Cir. 2013).

In short, Plaintiffs' repeated failure to allege facts in support of their conclusory assertions of intentional race discrimination once again dooms the FAC, just as it doomed the original complaint. *See Ghosh v. Uniti Bank*, 566 F. App'x 596, 597 (9th Cir. 2014) (dismissing complaint where plaintiff "failed to allege any facts that support its contention that [the defendant] treated [the plaintiff] differently than similarly-situated mortgagees on account of [the plaintiff's] racial identity."); *Han v. Univ. of Dayton*, 541 F. App'x 622, 627 (6th Cir. 2013) (dismissing complaint where plaintiff "offered no specifics regarding who th[e] [similarly situated] employees were or how they were treated differently").

2. The Memorandum Of Understanding, On Its Face, Once Again Undermines Plaintiffs' Allegation Of Race Discrimination

Plaintiffs also recycle in the FAC their grossly distorted reading of the MOU. As before, this Court may consider the MOU because it is incorporated into the FAC

by reference. *See, e.g.*, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1160 (9th Cir. 2012). And on its face, the MOU makes clear that it is designed to *benefit* African American programmers by providing additional opportunities to obtain carriage on Comcast's cable systems. Specifically, Comcast "committed to add at least ten (10) new independently-owned-and-operated programming services over the next eight (8) years" and guaranteed that "[f]our (4) of the networks will be linear video programming services in which African Americans have a majority or substantial ownership interest." Dkt. 29-3, App'x A at 9. These networks, moreover, are to "be added on commercially comparable and competitive terms to the carriage of the services by other distributors." *Id.*

The MOU also established other diversity goals for Comcast, including creation of a "National African American Advisory Council" to "provide advice to the senior executive teams at Comcast and [NBCUniversal] regarding the companies' development and implementation of the master strategic plan to improve diversity practices at Comcast." *Id.* at 3. With respect to workforce diversity, Comcast agreed to "actively take steps to recruit African Americans in its workforce," such as "requiring a diverse pool of candidates for all hires at the vice president level and above." *Id.* at 5–6. And on procurement, Comcast agreed in the MOU to "commit at least an additional $7 million on advertising with minority-owned media," to work to "identify opportunities for spending with African American suppliers" in a variety of areas, ranging from construction to financial services, and to take additional steps to "enhance the utilization of African American owned enterprises." *Id.* at 8.

Contrary to Plaintiffs' allegations, the MOU guaranteed to networks with majority or substantial African American ownership an *additional* avenue to obtain carriage. In no way did it exclude those applicants from the "normal" contracting process. The MOU on its face establishes a contracting opportunity for African American content that might not be selected in the normal course given constrained bandwidth resources and the content's relatively unproven or limited demand—not a

limitation on such carriage. Because the text of the MOU itself plainly contradicts Plaintiffs' attempted distortions, this Court need not accept those allegations as true. *See Gonzalez v. Planned Parenthood of L.A.*, 759 F.3d 1112, 1115 (9th Cir. 2014) ("'[I]f those documents [incorporated by reference into the complaint] conflict with the allegations in the complaint, we need not accept those allegations as true.'" (quoting *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1196 (10th Cir. 2013) (alteration in original))).

In short, Plaintiffs' continued distortion of the MOU in the FAC—which this Court has already once rejected—does nothing to establish a plausible claim that Comcast discriminated against ESN on the basis of race.

3. Plaintiffs' Repeated Allegations About Comcast's Implementation Of The MOU Remain Irrelevant

Plaintiffs also continue to assert in conclusory fashion that Comcast has not lived up to various diversity initiatives from the MOU. *E.g.*, FAC ¶ 44. The Court previously deemed that allegation to be insufficient. Now Plaintiffs allege that Comcast has also misrepresented its progress on those initiatives in "Annual Compliance Reports" that are submitted to the FCC. *See* FAC ¶ 40. But merely calling Comcast a "liar" does not somehow lessen Plaintiffs' burden to come forward with facts substantiating their allegations of race discrimination. These types of conclusory allegations carry no presumption of truth. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (allegations that defendant "misrepresented its intentions in the merger to the FCC and customers, and then misled customers concerning the quality of the new service" were mere "conclusory allegations about fraud and the unfair treatment" of customers). In any event, even if these allegations were accepted as true, they have nothing to do with ESN's requests for carriage of its programming and thus do nothing to establish a plausible claim of racial discrimination. Indeed, Plaintiffs do not plead any facts as to how Comcast's

progress on its diversity goals is connected in any way to their purported injury. These conclusory allegations are thus wholly irrelevant to Plaintiffs' claims.

More fundamentally, the FAC's allegation that Comcast has not fulfilled its commitment to increase diverse programming rests entirely on Plaintiffs' idiosyncratic view of racial identity. Plaintiffs concede, as they must, that Comcast *has* launched two new African American owned networks, just as Comcast committed to doing in the MOU. FAC ¶¶ 50−53. Plaintiffs merely rehash their offensive (and false) allegations that "[t]hese networks give African American celebrities token ownership interests," FAC ¶ 52, and that Comcast refuses "to do business with *truly* African American-owned media companies," *e.g.*, FAC ¶ 3 (emphasis added), which is to say "100% African American-owned" media companies, *e.g.*, FAC ¶ 80. Ironically, Plaintiffs purport to support that contention in part by alleging that one of these channels is "owned by Highbridge Capital, which is run by . . . Payne Brown"—an African American man. FAC ¶ 51. Further, Plaintiffs again concede that Comcast carries the Africa Channel, which is owned 100% by African Americans. *See* FAC ¶¶ 53, 75–76. More fundamentally, "100% African American owned" is not a racial category that is known to either the law or the television industry.

Indeed, the FAC touts ESN's status as a "certified" "bona fide Minority Business Enterprise" as defined by the "National Minority Supplier Development Council, Inc.," FAC ¶ 14, even though the Council defines that status as a company with at least 51% diverse ownership and control. *See* Ex. 2 to October 21, 2015 Decl. of Douglas Fuchs (Certification Criteria, Nat'l Minority Supplier Dev. Council, *available at* http://www.nmsdc.org/mbes/mbe-certification). The Court may review these certification criteria because Plaintiffs incorporated them by reference into the FAC. *See Davis*, 691 F.3d at 1160. Apart from being offensive, Plaintiffs' emphasis on 100% racial purity is entirely contrived for litigation.

Plaintiffs also assert that the Diversity Advisory Councils that were established in the MOU in order to advise Comcast regarding its diversity initiatives are "shams."

FAC ¶ 41. But this is just another variation on the same theme—unchanged since the original complaint—that Comcast has not met its voluntary MOU obligations. Even if it were true that Comcast has not made sufficient progress on its efforts to build a more diverse company and programming lineup, that would not remotely suggest that Comcast actively discriminated against ESN on the basis of race. In any event, Plaintiffs' allegation is contradicted by the very FCC compliance reports that Plaintiffs mention, which this Court may consider because they are incorporated by reference. *See Davis*, 691 F.3d at 1160. The 2013 report, for example, states clearly that the councils "pla[y] a significant role in advising on the Company's diversity inclusion efforts" and are "actively engaged" in their work. Ex. 1 to October 21, 2015 Decl. of Douglas Fuchs, at 23. This Court, therefore, should not simply accept Plaintiffs' assertions about the work of the Diversity Advisory Councils. *See Gonzalez*, 759 F.3d at 1115.

4. As With The Original Complaint, The FAC Itself Reveals An Obvious, Non-Discriminatory Reason For Comcast's Decisions

When Plaintiffs' conclusory assertions and attempted distortions are swept aside, their remaining factual allegations give rise to the same plausible inference that doomed Plaintiffs' original complaint: Comcast exercised its business and editorial discretion in declining to carry ESN's programming. As in their original complaint, the FAC contains no facts "tending to exclude the possibility that th[is] alternative explanation is true." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). To the contrary, their allegations (which are substantially similar to those in Plaintiffs' original complaint) once again *confirm* the existence of an obvious, nondiscriminatory explanation for Comcast's actions.

Cable operators such as Comcast have limited bandwidth and thus consider a range of "non-discriminatory business reasons" in making carriage decisions, including their evaluation of the proposed programming, whether their bandwidth could be put to better use (including by saving it for future networks), whether the

channel is an established brand with proven appeal to subscribers, and whether the terms offered by the channel are favorable. *In re Herring Broad.*, 26 F.C.C. Rcd. 8971, 8976 (2011) (internal quotation marks omitted). Cable operators also have editorial discretion, protected by the First Amendment, to determine what programming to carry on their networks. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

Here, Plaintiffs' own allegations demonstrate wholly plausible business reasons behind Comcast's decision not to carry ESN's channels. By Plaintiffs' own admission, Comcast told ESN that it did not want to devote its limited bandwidth to ESN's seven channels in high-definition (which requires even more bandwidth), that Comcast was more interested in expanding its programming with "news and sports channels," and that there was a lack of "demand" for ESN's channels. FAC ¶¶ 61–63. All of these are perfectly legitimate and plausible business reasons that appear on the face of the FAC. And yet, Plaintiffs again provide no facts to exclude those plausible business reasons: they respond only that Comcast has added *some* other (unspecified) channels, *some* of which were not focused on news and sports, and that ESN has had significant "ratings growth" during "the short time it has been on the air." FAC ¶¶ 61–64. But those allegations do nothing to undermine Comcast's explanations for its decision not to contract with ESN, much less demonstrate that Comcast was *intentionally* discriminating against ESN on the basis of race. Comcast did not say that it would not add *any* new channels, or *any* new non sport-or-news channels. Instead, the obvious inference from the FAC is that Comcast had limited bandwidth and different priorities that ESN did not fit. And just like the original complaint, the FAC's statements about ESN's *growth*, even if true, do not show that ESN's channels had consumer demand that was competitive when compared to other applicants to Comcast for channel carriage.

Plaintiffs again allege that Comcast had "multiple meetings" with ESN, and now claim that Comcast asked ESN to "garner support from Comcast's Division offices in

order to bolster its carriage request," but ultimately advised that ESN "would have to wait to be part of the 'next round of [MOU] considerations.'" FAC ¶¶ 56–60, 68. But these allegations *undermine*, rather than support, Plaintiffs contention that Comcast discriminated based on race. Plaintiffs have never explained why Comcast would go to the trouble to conduct multiple meetings with ESN and give advice about ways that ESN could "bolster" its carriage application if Comcast never had any intention to make a deal. The far more plausible inference is that Comcast seriously considered ESN for carriage, but ultimately declined to carry ESN's channels for business reasons, and then offered ESN an *additional* opportunity to seek carriage through the process for minority applicants that was created in the MOU. None of Plaintiffs' other allegations "ten[ds] to exclude" this obvious, non-discriminatory explanation. *Century Aluminum*, 729 F.3d at 1108. Indeed, by pleading that Comcast spent so much time working with ESN before deciding to go in a different direction, *see* FAC ¶¶ 56–60, Plaintiffs' own allegations establish that Comcast makes carriage decisions based on business considerations, not race.

Nor can Plaintiffs infer discrimination from their new allegation that ESN offered for Comcast to launch one of its channels (Justice Central) for free. *See* FAC ¶ 65. Comcast has limited bandwidth, and cannot carry every channel that applies for carriage even when a channel is offered for "free." Every channel that goes on air—especially the high-definition channels that ESN produces—uses up bandwidth, which must either be taken from existing channels or that could be saved for other new channels with higher demand. *See, e.g.*, *TCR Sports Broad. Holding, LLC v. FCC*, 679 F.3d 269, 275–76 (4th Cir. 2012) (concluding that legitimate "business justifications for denying . . . carriage" included the "opportunity costs associated with . . . carriage," such as the potential that adding a network would require a cable company to "delete existing programming services"). Plaintiffs do not and cannot allege that Comcast accepts every channel offered to it for "free" or that Comcast has unlimited bandwidth.

In short, Comcast's decision not to carry ESN's channels is explained entirely by Comcast's own business interests. Plaintiffs' handful of additional allegations about ESN's negotiations with Comcast do not come close to making it plausible that ESN was a victim of race discrimination. Zero plus zero is still zero.

C. Even If Plaintiffs Had Alleged Facts Sufficient To State A Plausible Claim, Such A Claim Would Be Precluded By The First Amendment

As demonstrated above, Plaintiffs have again failed to allege any plausible claim and for that reason alone the Court should dismiss the FAC with prejudice. But even assuming that Plaintiffs could state a plausible claim, that claim would fail as a matter of law because Plaintiffs are seeking through this action to regulate Comcast's First Amendment right to exercise its editorial discretion to select which channels to transmit to its subscribers. "Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636; *see also Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Just as a newspaper exercises editorial discretion over which articles to run, a video programming distributor exercises editorial discretion over which video programming networks to carry and at what level of carriage."). Plaintiffs' insufficiently pleaded claim is, at its core, an attempt to have this Court impose liability on Comcast for exercising its First Amendment right to select which content to transmit to its subscribers. Accordingly, dismissal with prejudice is required for this additional reason. *See Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012) (dismissing § 1981 claim on First Amendment grounds).

CONCLUSION

This Court has already granted Plaintiffs an opportunity to amend their complaint. Given Plaintiffs' approach in the FAC, it is clear that Plaintiffs cannot plead any facts that would render their allegations plausible. Thus, any further

amendment would be futile. This Court should dismiss Plaintiffs' FAC with prejudice for failure to state a claim to relief.

DATE: October 21, 2015

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

NATIONAL ASSOCIATION OF AFRICAN AMERICAN-OWNED MEDIA, a California limited liability company; and ENTERTAINMENT STUDIOS NETWORKS, INC., a California corporation,

Plaintiffs,

v.

CHARTER COMMUNICATIONS, INC., a Delaware corporation; FEDERAL COMMUNICATIONS COMMISSION, a federal agency; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 2:16-cv-00609

COMPLAINT FOR CIVIL RIGHTS VIOLATION; FOR DAMAGES; AND FOR INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

Plaintiffs National Association of African American – Owned Media ("NAAAOM") and Entertainment Studios Networks, Inc. ("Entertainment Studios") allege claims against Defendants Charter Communications, Inc. ("Charter"), the Federal Communications Commission ("FCC") and DOES 1 through 10, inclusive, (collectively, "Defendants") as follows:

INTRODUCTION

A. Background

1. This case is about racial discrimination in contracting for television channel carriage. At the direction of its President and Chief Executive Officer, Tom Rutledge, Defendant Charter Communications has intentionally excluded African American–owned media companies, including Plaintiff Entertainment Studios, from contracting for carriage on its television distribution platform. Rutledge did this himself and by and through his subordinates, including Allan Singer, Senior Vice President of Programming at Charter.

2. Entertainment Studios—a 100% African American–owned media company with a portfolio of seven, 24-hour, high definition television networks currently carried by AT&T U-Verse, Verizon Fios and DirecTV, among others—has been attempting to enter into a carriage agreement with Charter for years, to no avail.[1] Rutledge has refused to take, or return, any of Entertainment Studios' calls or to meet with Byron Allen, the African American founder, chairman and CEO of Entertainment Studios. Even when Entertainment Studios implores Rutledge's underlings to approach Rutledge regarding the launch of Entertainment Studios' channels on Charter's television system, Rutledge refuses to consider a possible carriage deal with this African American–owned media company.

[1] A carriage agreement is a contract between a multichannel video programming distributor, such as Charter, and a channel vendor/programmer, such as Entertainment Studios, granting the distributor the right to "carry" (that is, distribute) the programmer's channels.

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3. Rutledge's unwavering refusal to negotiate a carriage deal with Entertainment Studios effectively blocks Entertainment Studios' portfolio of television networks from reaching Charter's millions of subscribing television viewers. Charter currently provides cable television services to more than four million subscribers and is poised to dramatically increase its television footprint with the acquisition of Time Warner Cable (currently the fourth-largest television distributor in the United States) and Bright House Networks (tenth-largest).

4. If these acquisitions go through, Charter will become the third-largest television distributor, and the second-largest cable and broadband internet operator, in the United States with more than seventeen million subscribers. This merged television distributor will be headed up by Rutledge—who is a blatant racist.

5. Charter's merger application is currently pending before the Federal Communications Commission ("FCC"), one of the federal agencies tasked with reviewing the merger to ensure that it will serve the public interest. This public interest evaluation considers a multitude of factors, including whether the proposed merger would promote a diversity of information sources to the public. Needless to say, diversity requires the economic inclusion of African American–owned media companies.

6. Diversity is a core concern for FCC merger approval. Indeed, a driving purpose of the Federal Communications Act and the First Amendment is to ensure the widest possible dissemination of information from diverse sources. Yet the FCC has done nothing to protect the voices of African American–owned media companies in the face of increased media consolidation.

7. Instead, the FCC works hand-in-hand with these merging television distribution companies to enable and facilitate their Civil Rights violations. The FCC's apparent standard operating procedure is to obtain and accept sham diversity commitments from merger applicants, in excess of its statutory duties.

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8. Unlike a merger condition, these diversity "commitments" are shielded from judicial review under the dubious pretense that the merging parties "volunteered" to them. But, in actual practice, the FCC routinely encourages, and then accepts as reliable, these empty diversity promises in order to ostensibly satisfy the law's diversity requirements.

9. These commitments—whose genesis is, at best, questionable—do nothing to actually protect or promote diversity in the media industry. They merely foster a public impression that the FCC is taking steps to enhance diversity. In reality, these superficial commitments—entered into with non-media, non-channel-owner civil rights groups—harm African American–owned media companies. The FCC's conduct actually facilitates the economic exclusion African American–owned media companies and supports white ownership using African American "fronts."

10. In this regard, the FCC has violated—and continues to violate—Entertainment Studios' equal protection rights under the due process clause of the U.S. Constitution. The FCC enables and facilitates Charter's racial discrimination in contracting, in violation of 42 U.S.C. § 1981.

11. Given Charter's record of refusing to do business with African American–owned media companies, as detailed herein, Charter's proposed merger with Time Warner Cable and Bright House Networks will neither promote diversity nor be in the public interest. Rutledge is now trying to cast Charter as a promoter of diversity, despite his and Charter's sordid record of refusing to do business with African American–owned media companies.

12. Rutledge recently announced that Charter has entered into a memorandum of understanding ("MOU") with a dozen "multicultural leadership organizations," including Al Sharpton's National Action Network, among other non-media civil rights groups. Through the MOU, Charter has made a number of symbolic commitments that it says it will implement upon approval of the merger, including appointing minority members to its presently all-male, all-white Board of

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Directors; appointing a so-called "Chief Diversity Officer"; and enhancing its "involvement and investment" in organizations serving communities of color—*i.e.*, making monetary "contributions"—pay offs—to non-media civil rights groups that support the merger.

13. In other words, rather than actually doing business with African American–owned media companies, Rutledge and Charter have chosen to secure merger support by embracing Al Sharpton and other non-media civil rights groups. But Al Sharpton neither owns nor operates a television network. Nor does Sharpton speak for all Black people, and certainly not for all, or any, African American–owned media companies. He is a token, a shill being used by Rutledge, Charter and the FCC. Charter uses Al Sharpton as racial cover, which is far less expensive than doing real business with African American–owned media companies, like Entertainment Studios.

14. Sharpton has a well-documented business model and track record of obtaining payments from corporate entities in exchange for his support on "racial issues." Sharpton can be bought on the cheap. Doing business with real African American–owned media companies requires true economic inclusion for African Americans—something that is unacceptable to Rutledge and Charter.

15. Rutledge and Charter's motives are made evident by the "promises" made in the MOU. Indeed, the MOU's symbolic commitments do nothing to promote diversity in the media industry. Charter has made no commitment—through the MOU or otherwise—to contract with and thereby ensure true economic inclusion for African American–owned media companies.

16. The MOU includes no pledge by Charter to launch African American–owned and operated networks. Rather, Charter states only that it will "expand programming targeting diverse audiences." But this vague "commitment" does nothing to promote and protect programming from—and economic inclusion of—diverse sources, which is the very heart of the public interest diversity inquiry.

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17. Charter's MOU is nothing more than a ploy to garner FCC support for and approval of its merger with Time Warner Cable and Bright House Networks. In this regard, Charter has taken a page out of a familiar playbook—the same one another cable giant, Comcast, used to gain approval of its 2011 merger with NBC-Universal.

18. In the time leading up to its merger, Comcast, too, was criticized for its poor track record in contracting for carriage with minority-owned media companies. To counter the opposition to its merger, Comcast entered into memoranda of understanding with some of the same non-media civil rights groups Charter has now partnered with. Comcast, like Charter, made purely symbolic diversity commitments, without any true intentions of doing business with African American–owned media companies. And, indeed, post-merger, Comcast has flouted its MOU commitments and steadfastly refused to do business with truly African American–owned media companies.

B. FCC Futility

19. Charter is playing the same game as Comcast. And if the past is any predictor of the future, Charter's merger is on the path to approval. Just as the FCC, in approving Comcast's merger, chose to rely on Comcast's sham diversity commitments in an MOU, so too is the FCC on track to approving Charter's merger based on the same sham diversity commitments.

20. The FCC has established, repeatedly, that it is ready, willing and able to give merger applicants significant credit for making "voluntary" diversity commitments. Through this practice, the FCC has encouraged merger applicants—including Charter—to take that route. The result provides the agency and the merging parties with a "win-win" situation: The FCC can claim that it has secured voluntary concessions (and, thus, can posture itself as a champion of diversity), while the applicants get what they want—*i.e.*, agency approval.

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21. Because of the supposedly "voluntary" nature of the "diversity commitments," the FCC's actions in this regard are immune to judicial review. The only losers here are the *bona fide* African American–owned media companies who are left out in the cold. The FCC is exceeding its statutory duties; this practice violates the law.

22. If the FCC approves Charter's merger and Charter becomes the third-largest television distributor in the United States, Entertainment Studios and other African American–owned media companies will be shut out from Charter's seventeen million subscribers due to Charter's racial discrimination in contracting.

23. The FCC has done nothing to enforce or investigate Comcast's blatant violations of the commitments it made in its MOU, signaling to Charter that empty promises and symbolic gestures are all that is required to satisfy the FCC. There is no accountability in the FCC.

24. Based on the FCC's established practice of encouraging merger applicants to enter into sham diversity agreements in order to secure merger approval, the FCC is engaging in extra-legal activity exceeding its statutory duties. It would therefore be futile for Plaintiffs to approach the FCC and seek relief therein.

25. Absent court intervention, the FCC will approve Charter's merger based on its phony MOU, without consideration for Charter's racially discriminatory policies and practices in contracting for channel carriage, as detailed herein. The FCC is thereby encouraging the racist and discriminatory practices of Charter to continue unabated.

C. <u>Racial Discrimination</u>

26. Plaintiff Entertainment Studios is a 100% African American–owned media company involved in the production and distribution of television programming through broadcast television, its seven cable television channels and its subscription-based internet service. It is the only 100% African American–

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owned video programming producer and multi-channel operator/owner in the United States. It is a victim of Charter's racial discrimination in contracting and the FCC's practice of providing its governmental stamp-of-approval on racial discrimination in the media industry, in violation of law.

27. Charter has come up with every excuse in the book to avoid doing business with Entertainment Studios. For example, Charter claimed to have "bandwidth challenges," but in reality it was reserving all of its bandwidth for other, non-African American-owned networks. It also claimed that it was not launching any new networks "for the foreseeable future," a statement which has been belied by Charter's launch of several new channels during the same time period, including (as just one example) white-owned RFD-TV.

28. Entertainment Studios was also told by Charter personnel that Charter's President and CEO, Tom Rutledge, "doesn't meet with programmers," and thus they should not reach out to him to discuss a carriage deal. The truth is, Rutledge does not meet with African American–owned programmers, like Entertainment Studios. He has been witnessed meeting with other, white-owned programmers. Rutledge is pulling the strings at Charter and is orchestrating its pretextual excuses for its discriminatory refusal to do business with Entertainment Studios.

29. On information and belief, Charter currently spends upwards of $4 billion annually to license video programming via channel carriage agreements. Of this, nothing is paid to 100% African American–owned multi-channel media companies. This discrepancy is the result of—and evidences—racial discrimination in contracting, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

30. Section 1981 was enacted to eradicate racial discrimination in contracting. It was enacted after the adoption of the Thirteenth Amendment eradicating slavery, to outlaw racial discrimination in contracting. Under Rutledge, Charter's business model is to engage in economic exclusion of African American–owned media companies by "buying" the support of an African American shill

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(Sharpton) to mask Charter's racist business practices. This business model completely undermines the purpose and intent of the Civil Rights Act and constitutes unlawful discrimination under § 1981.

31. Through this lawsuit, Entertainment Studios and NAAAOM seek to vindicate their rights under 42 U.S.C. § 1981 and to enforce their due process rights under the Fifth Amendment to the U.S. Constitution. To that end, Plaintiffs seek an order compelling the FCC to discontinue its facilitation of Charter's racial discrimination in contracting for channel carriage and end the practice of allowing sham MOUs to satisfy diversity requirements.

PARTIES, JURISDICTION AND VENUE

D. Plaintiffs

32. Plaintiff NAAAOM is a California limited liability company, with its principal place of business in Los Angeles, California.

33. NAAAOM was created and is working to obtain for African American–Owned media companies the same contracting opportunities as their white counterparts for, among other things, distribution, channel carriage, channel positioning and advertising dollars. Its mission is to secure the economic inclusion of African American–owned media companies in contracting, the same as white-owned media companies. NAAAOM currently has six members.

34. Historically, because of the lack of distribution/advertising support and economic exclusion, African American–owned media companies have been forced either to (i) give away significant equity in their enterprises; (ii) pay exorbitant sums for carriage, effectively bankrupting the business; or (iii) go out of business altogether, pushing African American–owned media to the edge of extinction.

35. As alleged herein, Entertainment Studios—a member of NAAAOM—is being discriminated against on account of race in violation of 42 U.S.C. § 1981. Entertainment Studios thus has standing to seek redress for such violations in its own right. The interests at stake in this litigation—namely, the right of African

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American–owned media companies to make and enforce contracts in the same manner as their white-owned counterparts—are consonant with NAAAOM's purpose. NAAAOM seeks only injunctive relief, so the individual participation of its members is not required.

36. Plaintiff Entertainment Studios Networks, Inc. is a California corporation, with its principal place of business in Los Angeles, California. Entertainment Studios is a 100% African American–owned television production and distribution company. It is the only 100% African American–owned video programming producer and multi-channel operator/owner in the United States.

37. Entertainment Studios is a bona fide Minority Business Enterprise as defined by the National Minority Supplier Development Council, Inc. and as adopted by the Southern California Minority Supplier Development Council.

38. Entertainment Studios was founded in 1993 by Byron Allen, an African American actor / comedian / media entrepreneur. Allen is the sole owner of Entertainment Studios. Allen first made his mark in the television world in 1979, when he was the youngest comedian ever to appear on "The Tonight Show Starring Johnny Carson." He thereafter served as the co-host of NBC's "Real People," one of the first reality shows on television. Alongside his "on-screen" career, Allen developed a keen understanding of the "behind the scenes" television business. Over the past 22+ years, he has built Entertainment Studios as an independent media company.

39. Entertainment Studios has carriage contracts with more than 40 television distributors nationwide, including AT&T/DirecTV, VerizonFIOS, Suddenlink, RCN and CenturyLink. These television distributors broadcast Entertainment Studios' networks to their millions of subscribers.

40. Entertainment Studios owns and operates seven high definition television networks (channels), six of which were launched to the public in 2009 and one in 2012. Entertainment Studios produces, owns and distributes over 32

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television series on broadcast television, with thousands of hours of video programming in its library. Entertainment Studios' shows have been nominated for, and won, the Emmy award. A copy of an Entertainment Studios promotional presentation highlighting key aspects of the company and the programming it produces is attached hereto as **Exhibit A**.

41. In December 2012, Entertainment Studios launched "Justice Central," a 24-hour, high definition court/informational channel featuring several Emmy-nominated and Emmy-award winning legal/court shows. After just three years, Justice Central has already proved itself a successful channel, boasting tremendous ratings growth across key television viewing periods and demographics.

E. Defendants

42. Charter Communications, Inc. is a Delaware corporation with its principal place of business in Stamford, Connecticut. Charter also has an office, is registered to do business and operates in California. Charter is currently the seventh-largest television distribution company in the United States, providing subscription television services to more than four million subscribers. If its merger application goes through, it will become the third-largest television distribution company in this country, with more than seventeen million subscribers.

43. The Federal Communications Commission is the federal administrative agency tasked with regulating interstate and international communications by radio, television, wire, satellite and cable.

44. Plaintiffs are informed and believe, and on that basis allege, that Defendants DOES 1 through 10, inclusive, are individually and/or jointly liable to Plaintiffs for the wrongs alleged herein. The true names and capacities, whether individual, corporate, associate or otherwise, of Defendants DOES 1 through 10, inclusive, are unknown to Plaintiffs at this time. Accordingly, Plaintiffs sue Defendants DOES 1 through 10, inclusive, by fictitious names and will amend this Complaint to allege their true names and capacities after they are ascertained.

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F. Jurisdiction & Venue

45. This case is brought under a federal statute, § 1981 of the Civil Rights Act, and under the Constitution of the United States; as such, there is federal question jurisdiction under 28 U.S.C. § 1331. Venue of this action is proper in Los Angeles because Charter resides in this district, as defined in 28 U.S.C. § 1391; and the acts in dispute were committed in this district.

FACTS

A. Racial Discrimination in the Media

46. Racial discrimination in contracting is an ongoing practice in the media industry, with far-reaching adverse consequences. It effectively excludes African American–owned media companies and African American individuals—and their diverse viewpoints—from the vast majority of the television viewing audience.

47. Major television channel distributors, like Charter, have unique power to limit the viewpoints available in the public media. Channel owners, like Entertainment Studios, are reliant upon the services of television distributors, like Charter, to provide access to their distribution platforms not only to realize subscriber and advertising revenue, but also to reach television consumers themselves.

48. Charter has control over television distribution on its distribution platform; its exclusion of African American–owned channels has contributed to the near-extinction of African American ownership in mainstream media, and this exclusion is self-perpetuating.

49. There is a statistic that highlights the inequity here: Charter's President and CEO, Tom Rutledge—the main perpetrator of the discrimination recounted herein—was paid $16.1 million in compensation in 2014 alone, while 100% African American–owned media companies received *nothing* by way of license fees from Charter.

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50. White-owned media has worked hand-in-hand with governmental regulators to perpetuate the exclusion of truly African American–owned media companies from contracting for channel carriage. This has been done through, among other things, the use of "voluntary" diversity commitments made by merging television distribution companies in order to secure merger approval from the FCC.

51. To satisfy their diversity commitments, these merger applicants then use "token fronts" and "window dressing"—African American shills posing as "fronts" or "owners" of so-called "Black cable channels" that are actually majority owned and controlled by white-owned businesses.

B. <u>The FCC's Prior Track Record – Comcast/NBC-Universal Merger</u>

52. In connection with its 2010 bid to acquire NBC Universal, television distributor Comcast misled and circumvented the FCC and its diversity requirements by the use of, and through, a sham "diversity" MOU.

53. In the time leading up to the merger, Comcast was criticized for its failure to do business with minority-owned media companies, including African American–owned media companies.

54. As with Charter's merger with Time Warner Cable and Bright House Networks, Comcast's merger was subject to regulatory approval by the FCC. Entertainment Studios and other minority-owned media companies opposed Comcast's merger bid, publicly criticizing Comcast for its failure to do business with African American–owned media companies. Entertainment Studios urged the FCC to impose merger conditions that would address Comcast's discriminatory practices in contracting for channel carriage.

55. Realizing that its racist practices and policies jeopardized the approval of the NBC-Universal acquisition, Comcast entered into a MOU with non-media civil rights groups, including Al Sharpton's National Action Network. These non-media civil rights groups are not television channel owners and do not operate in the television channel business.

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56. Through the MOU, Comcast purported to address the widespread concerns regarding the lack of diversity in channel ownership on its systems by, among other things, committing to launch several new networks with minority ownership and establishing "external Diversity Advisory Councils" to advise Comcast as to its "diversity practices," including in contracting for carriage.

57. In reality, the MOU was a ruse designed to secure merger approval without obligating Comcast to do business with truly African American–owned media companies. And the ruse worked: In 2011, the FCC approved Comcast's merger with NBC-Universal, emphasizing Comcast's adherence to the "commitments" it made in the MOUs.

58. But the FCC conducted no actual inquiry into Comcast's discriminatory practices in contracting for channel carriage. The FCC turned a blind eye to Comcast's racist practices and policies. And the FCC never made any effort whatsoever to follow up as to whether Comcast actually fulfilled its "voluntary commitments," even in the face of substantial evidence demonstrating that Comcast had violated those commitments entirely.

59. Post-merger, Comcast has flouted its MOU commitments. It has not entered into carriage agreements with any truly African American–owned media companies. Rather, the networks Comcast has launched pursuant to the MOU are owned, controlled and backed by white-owned media and money. Comcast gave African American celebrities token ownership interests in those channels to serve as figureheads in order to cover up its racial discrimination in contracting.

60. The "external Diversity Advisory Councils" Comcast established are also shams. Not only do the Council members have limited understanding of the television industry and little-to-no experience operating television networks, but Comcast has not given the Council any real authority to "advise" Comcast as to its diversity initiatives in contracting for carriage. Instead, Comcast gave the Council members a standard tour of its offices, and never even asked the members about

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channel carriage. The Diversity Advisory Councils were nothing more than an empty symbolic gesture to secure merger approval.

61. Despite Comcast's failure to adhere to the diversity commitments it made in the MOUs, the FCC has done nothing to cure Comcast's violations or otherwise enforce Comcast's promises of diversity. The FCC has thus signaled to Charter and any other media companies seeking approval of major mergers and acquisitions that empty promises and symbolic gestures are all that is required to satisfy the FCC that a proposed merger will promote diversity and thereby be in the "public interest."

62. There is no accountability imposed by the FCC. "Window dressing" by way of sham "diversity" MOUs is how the FCC operates, and it is happening again here in connection with the proposed Charter merger with Time Warner Cable and Bright House Networks.

C. Taking A Play Out of Comcast's Playbook, Charter Enters Into An MOU With Non-Media Civil Rights Groups

63. Recently, Charter's President and CEO, Tom Rutledge, announced that Charter had entered into a memorandum of understanding with twelve "multicultural leadership organizations"—*i.e.*, non-media civil rights groups—including the National Urban League and Al Sharpton's National Action Network.

64. Implementation of Charter's MOU is *contingent upon* the approval of Charter's merger application by the FCC. Rutledge's motive in entering into the MOU is thus transparent: The pledges made by Charter are designed to facilitate approval of the merger; Charter otherwise has no true intention of increasing diversity or inclusion in its business practices, including with respect to contracting for channel carriage. If the merger falls through, it is business as usual at Charter—*i.e.*, diversity is not on the agenda.

65. Charter's press release regarding the MOU states that the MOU includes "specific steps" that Charter will take, post-merger, including the

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following:

- Appointing one African American, one Asian American / Pacific Islander and one Latino American to its board of directors within two years of the close of the transaction;
- Appointing a so-called "Chief Diversity Officer"; and
- Expanding "programming targeting diverse audiences."

66. These first two commitments—to add minority members to its board of directors and appoint a "Chief Diversity Officer"—are symbolic, empty promises. They do nothing to enhance diversity of information sources available to Charter's subscribers, nor to advance diverse ownership or economic inclusion of African American–owned media companies. The fact that, in 2016, Charter does not already have a Diversity Officer indicates that Charter has no interest in diversity. And as a matter of fact, Charter does not even have a woman on its Board of Directors.

67. Nor does Charter's vague commitment to "expand programming targeting diverse audiences" promote diversity in ownership, or economic inclusion of African American–owned media companies, in any real way. Through this pledge, Charter committed only to distributing more programming "targeting" diverse audiences. Charter has made no commitment to actually do business with minority-owned media companies.

68. Without a commitment to doing business with minority-owned media companies, there can be no true economic inclusion for such companies in the media industry. Charter's symbolic commitments to add minority members to its board and appoint a "Chief Diversity Officer" do nothing to protect African American–owned media companies, like Entertainment Studios, from continued economic exclusion by Charter. Post-merger and post-implementation of the MOU, the television content available to Charter's seventeen million subscribers will continue to be limited by Charter's racial discrimination in contracting.

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D. Charter's Discriminatory Refusal To Contract With Entertainment Studios

69. For over five years, Entertainment Studios has attempted to contract with Charter for carriage of its television channels, to no avail. In fact, Charter's top programming official, Allan Singer, Senior Vice President, time and again refused to meet with this African American–owned media company to discuss a possible carriage deal, sometimes pushing Entertainment Studios' meeting requests back by a year or more.

70. At Rutledge's direction, Singer and other Charter executives have given Entertainment Studios multiple, pretextual excuses for why "now" was never the right time to seek carriage.

71. For example, in 2011, Entertainment Studios reached out to Charter to discuss a possible carriage deal. Singer told Entertainment Studios they needed to "be a bit patient." He insisted that they try again "next year" instead.

72. When "next year" rolled around, Singer still would not give Entertainment Studios the time of day. In 2012, Singer explained that, again, "now" was not the right time. Speaking on behalf of Charter, Singer stated "we aren't launching." As additional excuses, Singer also told Entertainment Studios that Charter's "bandwidth and operational demands have increased," such that it did "not have any opportunities for the foreseeable future." Just as he did in 2011, Singer told Entertainment Studios that a "meeting in 2012 doesn't make sense."

73. Charter's pretextual claims that, in 2012, it was not launching any new networks on its system and that it had bandwidth problems are provably false. During this same period, Charter was in negotiations to launch several new white-owned networks on its system. Indeed, in late 2012, Charter publicly announced that it had entered into carriage agreements with, among others, Walt Disney Company (for the Longhorn Network, among others) and Time Warner Cable Sports.

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74. Charter's pretextual excuses and refusals to discuss a carriage deal with Entertainment Studios continued into 2013. In 2013, Charter again told Entertainment Studios that it would not launch its networks "for the foreseeable future," further stating that it would not even allow Entertainment Studios to make "another pitch."

75. According to Singer, Charter did not believe in Entertainment Studios' "tracking model" because Entertainment Studios' content not only appears on Entertainment Studios' channels, but is also sold to other broadcast stations and cable networks. This is yet another made up excuse. Indeed, several white-owned media companies with which Charter has carriage agreements have the same business model—*i.e.*, their content not only appears on their channels but is also sold to other networks. If this business model is satisfactory for these white-owned networks, so too should it be satisfactory for this African American–owned media company.

76. Also in 2013, Singer advised Entertainment Studios that Charter would be willing to keep one of Entertainment Studios' channels, Justice Central, in consideration only for "the next e basic launches"—*i.e.*, the "expanded basic" or second-highest penetrated tier in the industry. After several years of making no progress with Charter, Entertainment Studios was surprised and excited by this potential launch opportunity.

77. Entertainment Studios thanked Charter for its consideration of Justice Central as part of its next e basic launches. But this potential launch opportunity was too good to be true. Charter had no true intention of ever doing business with Entertainment Studios. Shockingly, Singer told Entertainment Studios: "I was being facetious. We are never doing e basic launches . . . ." In other words, the only consideration Charter was willing to give to Entertainment Studios was for a service that it *never intended* to launch or utilize. Singer also stated, "Even if you get support from management in the field, I will not approve the launch of your

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networks."

78. Sensing that it could make no progress through Singer, Entertainment Studios requested a meeting with Charter's President and CEO, Tom Rutledge. But, again, this avenue for negotiating carriage was thwarted. Singer told ESN that Rutledge "does not meet with programmers." To the contrary, however, Entertainment Studios witnessed Rutledge meeting with Phillipe Daumann, CEO of Viacom—*i.e.*, a programmer (who is white).

79. Thus, on its own initiative, ESN reached out to Rutledge in March 2013. Rutledge never even responded.

80. Charter's excuses in 2013 for why Entertainment Studios would not be eligible for a carriage deal "in the foreseeable future" are pretextual. In 2013, it was publicly announced that Charter had entered into a channel carriage agreement with white-owned/controlled RFD-TV, which provides programming focused on rural and western lifestyle issues.

81. Despite Charter's repeated refusals to negotiate for carriage with Entertainment Studios, Entertainment Studios persisted. They reached out again in June 2015. Despite several years of knocking on Charter's door and countless attempts to set in-person meetings and phone calls to discuss a carriage deal, Singer feigned ignorance in response to Entertainment Studios' renewed carriage request.

82. Singer lied. He claimed that he believed Entertainment Studios was "no longer interested" in obtaining carriage on Charter's system. Singer further stated that "practice in the industry" dictated that Entertainment Studios "provide a presentation about [its] channels as the first step to considering carriage," and that he "looked forward to learning more about them." But Entertainment Studios had already provided information about its channels to Singer on multiple occasions throughout their years-long efforts to obtain carriage with Charter.

83. Singer's comments in this regard were disingenuous. Entertainment Studios at no time stopped seeking carriage on Charter's system, and Singer had no

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legitimate basis to believe they were "no longer interested" in a carriage deal. Indeed, Singer often balked at Entertainment Studios' persistence, telling them that he did not need "another pitch" from the company and that it did not make sense to "meet again" regarding Entertainment Studios' request carriage. Singer was, once again, just making up excuses to avoid doing business with this African American–owned media company.

84. Entertainment Studios called Singer out on his lies and phony excuses. And in doing so, Entertainment Studios copied several FCC commissioners, including Chairman Wheeler, to notify them of Charter's discriminatory practices in contracting for carriage. In other words, the FCC has already been apprised of Charter's unfair and discriminatory business practices; hence Charter's eagerness to "prove" it is now a proponent of diversity in the media industry to get its merger approved.

85. Despite Entertainment Studios' many attempts to reach out to Chairman Wheeler and the FCC to address the rampant racism in the media industry, Chairman Wheeler would not set a meeting with Entertainment Studios founder, chairman and CEO, Byron Allen, or even return his numerous phone calls.

86. After Entertainment Studios called Singer out on his lies and excuses, Singer finally agreed to set a meeting with Entertainment Studios in July 2015.

87. Entertainment Studios' team traveled from their office in Los Angeles to Charter's headquarters in Connecticut, with the understanding that the purpose of the meeting was to negotiate the terms of a carriage deal. But when they arrived, they soon learned that was not the case. Singer dragged Entertainment Studios to Connecticut just so he could say that he met with them and gave them consideration for a carriage deal. But at the meeting, he made clear that Charter would never consider doing business with Byron Allen's company.

88. Once more, Singer gave Entertainment Studios all the excuses in the book. For example, Singer told Entertainment Studios that Rutledge wanted to wait

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to "see what AT&T does." But AT&T already carried one of Entertainment Studios' networks (Justice Central) at the time, and AT&T has since launched Entertainment Studios' entire portfolio of channels on its television distribution system. Despite this—and despite Charter's indication that it just wanted to wait to "see what AT&T does"—Charter still refuses to carry *any* of Entertainment Studios' channels.

89. Charter also told Entertainment Studios that it would have to wait until after the merger was approved to be considered for a carriage deal. According to Charter, until the merger is approved, there are "too many unknowns" to enter into a carriage deal with Entertainment Studios. Singer told Entertainment Studios: "You go back to the line"—*i.e.*, "Get to the back of the bus behind white-owned channels who have carriage."

90. Charter just wanted to postpone the negotiations and lead Entertainment Studios to believe that it had a chance to obtain carriage on its system so that Entertainment Studios would not publicly oppose the merger on the basis of Charter's racist refusal to do business with African American–owned media companies.

91. Charter also continued its mantra regarding limited bandwidth as a pretextual excuse to avoid doing business with Entertainment Studios in 2015. But despite its purported bandwidth limitations, Charter expanded the reach of its distribution of white-owned RFD-TV in 2015, when it began distributing RFD-TV across its entire television footprint—including in major urban cities such as Los Angeles and Atlanta where, presumably, the demand for rural networking is not nearly as high as the demand for the general audience, lifestyle networks offered by Entertainment Studios. More pretext.

92. Meanwhile, Singer has ceased returning Entertainment Studios' calls altogether.

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93. Charter is discriminating against Entertainment Studios on account of race in connection with contracting for carriage in violation of the Civil Rights Act, 42 U.S.C. § 1981. Without access to viewers and without licensing fees and advertising revenues from one of the largest video programming distributors in the country, this African American–owned media company is being shut out and severely damaged.

FIRST CAUSE OF ACTION: VIOLATION OF CIVIL RIGHTS

(42 U.S.C. § 1981)

NAAAOM and Entertainment Studios Against Defendant Charter

A. Section 1981

94. Plaintiffs refer to and incorporate by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

95. Charter has engaged in, and is engaging in, pernicious, intentional racial discrimination in contracting, which is illegal under § 1981. Section 1981 is broad, covering "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

96. African Americans are a protected class under § 1981. Entertainment Studios is a 100% African American–owned media company.

97. As alleged herein, Entertainment Studios attempted many times over many years to contract with Charter to carry its channels, but Charter has refused, providing a series of phony, pretextual excuses. Yet Charter has continued to contract with—and make itself available to contract with—similarly situated white-owned television channels.

98. Charter has refused to contract with Entertainment Studios for channel carriage. Charter has a pattern and practice of refusing to do business, or offering unequal contracting terms to, African American–owned media companies.

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B. Damages

99. But for Charter's refusal to contract with Entertainment Studios, Entertainment Studios would receive millions of dollars in annual license fees and advertising revenue. Moreover, with distribution on one of the largest television platforms in the nation, the demand for Entertainment Studios' channels both domestically and internationally would increase, leading to additional growth and revenue for Entertainment Studios' channels.

100. Based on the revenue Entertainment Studios would generate if Charter contracted with them in good faith, Entertainment Studios would be valued at approximately $10 billion.

101. Similarly situated lifestyle and entertainment media companies are valued at higher amounts. But for Charter's refusal to contract with Entertainment Studios, Entertainment Studios would have a higher valuation.

102. Accordingly, Charter's unlawful discrimination has caused Entertainment Studios in excess of $10 billion in damages, according to proof at trial; plus punitive damages for intentional, oppressive and malicious racial discrimination.

SECOND CAUSE OF ACTION: VIOLATION OF DUE PROCESS UNDER THE FIFTH AMENDMENT

NAAAOM and Entertainment Studios Against Defendant FCC

103. Plaintiffs refer to and incorporate by reference each foregoing and subsequent paragraph of this Complaint as though fully set forth herein.

104. Defendant FCC is violating the due process rights of NAAAOM and Entertainment Studios by engaging in a pattern or practice of facilitating economic exclusion of African Americans by encouraging merger applicants to execute sham diversity MOUs in order to secure merger approval.

105. The FCC's pattern of accepting sham commitments to diversity permits television distributors, including Charter, to discriminate as described herein. This

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amounts to a racially discriminatory practice and procedure.

106. The U.S. Supreme Court has held that the Fifth Amendment to the U.S. Constitution contains an equal protection component prohibiting the federal government from invidiously discriminating between individuals or groups, including on the basis of race. This constitutional protection applies to actions by governmental agencies such as the FCC, which are required to provide Americans with equal protection of the laws without regard to race, based on the guarantee of liberty in the due process clause of the Fifth Amendment.

107. Discrimination based on race by a federal agency such as the FCC is so unjustifiable as to violate constitutional due process. The U.S. Supreme Court has repeatedly invalidated federal actions fostering discrimination in violation of due process clause.

108. In this case, the FCC's pattern and practice of facilitating Charter's racial discrimination by encouraging and accepting sham "diversity" MOUs, while in fact excluding African Americans from real economic inclusion, provides a federal government stamp of approval on these discriminatory practices. The result is that the FCC is complicit in Charter's racial discrimination in contracting for channel carriage, in violation of the U.S. Constitution.

109. Through the FCC's policy of leading Charter and other television distributors to eschew their commitments to diversity and true economic inclusion of African American–owned media companies by creating a false pretense of racial equality, the FCC denies Entertainment Studios and other African American–owned media companies of the constitutionally required due process guarantee to be free of government sanctioned invidious discrimination.

110. The FCC's encouragement and acceptance of sham MOUs and its "lip service" to African American–owned media companies fosters the false impression that the FCC has taken diversity considerations into account when determining whether a proposed merger is in the "public interest." This constitutes a pattern or

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practice of invidious discrimination in violation of the Fifth Amendment to the U.S. Constitution.

111. The FCC's established pattern and practice of facilitating discrimination by television distributors, including Charter, happens behind closed doors. There is no formal rule promulgated by the FCC governing this policy and practice, nor is there any recount or record of this policy and practice when the FCC approves a merger.

112. As a result, this discriminatory policy and practice by the FCC evades judicial review through traditional channels such as the Administrative Procedure Act. Indeed, nothing further could be gained by waiting for a final agency action, as the FCC's actions to facilitate discrimination have not and will not appear in any administrative record.

113. Exhaustion of administrative remedies is not required for a U.S. constitutional claim against a governmental agency. And based on the FCC's established practice of pretending to care about racial equality and claiming diversity as an important value, while actually encouraging the economic exclusion of African American–owned media companies, it would be futile for Plaintiffs to approach the FCC to exhaust their administrative remedies.

114. Defendant FCC's violations of the constitutional rights of NAAAOM and Entertainment Studios causes serious, irreparable, and lasting harm to Plaintiffs. Absent relief, the FCC will approve this merger under the façade of diversity and racial equality while being complicit in Charter's racially discriminatory policies and practices in contracting for channel carriage, thus encouraging the racist and discriminatory practices of Charter and other television distributors to continue unabated.

115. Accordingly, Plaintiffs hereby seek injunctive relief precluding the FCC from utilizing the sham diversity agreements offered by Charter in its regulatory review of the Charter / Time Warner Cable / Bright House merger.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment, as follows:

1. Plaintiff Entertainment Studios prays for compensatory, general and special damages from Charter in excess of $10 billion according to proof at trial;
2. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief prohibiting Charter from discriminating against African American–owned media companies, including Entertainment Studios, based on race in connection with contracting for channel carriage;
3. Plaintiff Entertainment Studios prays for punitive damages, based on oppression and malice, according to Charter's net worth;
4. Plaintiffs NAAAOM and Entertainment Studios pray for injunctive relief that the FCC discontinue its practice of facilitating sham "diversity" agreements/MOUs, including the Charter MOU described herein, and not rely on these agreements in considering whether to approve proposed mergers, including Charter's proposed acquisition of Time Warner Cable and Bright House Networks;
5. Plaintiff Entertainment Studios prays for attorneys' fees, costs and interest; and
6. Plaintiffs NAAAOM and Entertainment Studios pray for such other and further relief as the court deems just and proper.

DATED: January 27, 2016 MILLER BARONDESS, LLP

By: /s/ Louis R. Miller
LOUIS R. MILLER
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DEMAND FOR JURY TRIAL

Plaintiff Entertainment Studios hereby demands trial by jury pursuant to the Seventh Amendment of the United States Constitution on the 42 U.S.C. § 1981 claim for damages.

DATED: January 27, 2016 MILLER BARONDESS, LLP

By: /s/ Louis R. Miller
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